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Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

BOATMEN'S NATIONAL BANK OF ST. LOUIS,
AS SUCCESSOR IN INTEREST TO CENTERRE BANK, N.A.,
f/k/a FIRST NATIONAL BANK OF ST. LOUIS,
Petitioner,

vs.

GARLAND CARVER, SUCCESSOR TRUSTEE FOR CITY OF
MOUNT PLEASANT, IOWA, INDUSTRIAL DEVELOPMENT
REVENUE BOND ISSUE (SAI PROJECT) and CITY OF
GILMAN, IOWA, INDUSTRIAL DEVELOPMENT REVENUE
BOND ISSUE (SAI PROJECT),
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF IOWA**

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QUESTIONS PRESENTED

1. May a state court, consistent with 11 U.S.C. §1141(a), enter a judgment reallocating between competing bankruptcy creditors monies specifically awarded by a bankruptcy court without objection pursuant to a confirmed, final plan of reorganization?

2. Are the due process and equal protection clauses of the Fourteenth Amendment violated when a state appellate court awards damages not proven at trial by holding that the defendant has the burden of disproving a plaintiff's damages and by failing to remand the case to afford the defendant an opportunity to maintain that burden of proof?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were the Petitioner Boatmen's National Bank of St. Louis, Respondent Garland Carver, Trustee for the City of Mount Pleasant, Iowa, SAI Industrial Development Revenue Bond Issue Bondholders and the City of Gilman, Iowa, SAI Industrial Development Revenue Bond Issue Bondholders, and the Federal Deposit Insurance Corporation, as Receiver for the Mount Pleasant Bank and Trust Company.

Petitioner Boatmen's National Bank of St. Louis is a subsidiary of Boatmen's Bancshares, Inc. The affiliated companies of Petitioner, also subsidiaries of Boatmen's Bancshares, Inc., are listed in Appendix A, as required by Supreme Court Rule 28.1.

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Petitioner,

vs.

GARLAND CARVER, SUCCESSOR TRUSTEE FOR CITY OF
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REVENUE BOND ISSUE (SAI PROJECT) and CITY OF
GILMAN, IOWA, INDUSTRIAL DEVELOPMENT REVENUE
BOND ISSUE (SAI PROJECT),

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF IOWA**

Petitioner Boatmen's National Bank of St. Louis respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Iowa Supreme Court entered in the case of *Garland Carver v. The Federal Deposit Insurance Corporation, et al.*, rendered on April 18, 1990.

OPINIONS BELOW

The opinion rendered by the Iowa Supreme Court is reported at 455 N.W.2d 680 (Iowa 1990). The slip opinion is reprinted in Appendix B.

The findings of facts, conclusions of law and rulings of the trial court, following a non-jury trial, have not been reported. They are reprinted at Appendices D, E and F.

JURISDICTION

Respondent initiated this action in the District Court for Henry County, Iowa. On February 2, 1989, the District Judge for Henry County, Iowa issued his findings of fact and conclusions of law following a non-jury trial, which were supplemented on March 23, 1989 and finalized by his ruling dated April 20, 1989.

On April 18, 1990, the Iowa Supreme Court entered its decision affirming the trial court and issued its opinion on that date. Petitioner Boatmen's National Bank of St. Louis filed a Petition for Rehearing with the Iowa Supreme Court on April 30, 1990. On May 23, 1990, the Iowa Supreme Court, after reconsideration *en banc*, denied Petitioner's request for a rehearing. (Attached hereto as Appendix C).

Petitioner seeks review pursuant to 28 U.S.C. §1257 because this case raises a substantial federal question regarding the scope of the bankruptcy code *res judicata* provision contained at 11 U.S.C. §1141(a) and the binding effect of this provision on state courts as mandated by the supremacy clause, Article VI, clause 2 of the United States Constitution. Moreover, Petitioner challenges the Iowa Supreme Court's procedure of shifting the burden of proof as to damages, and the Court's failure to remand the case after shifting this burden, as being violative of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Title 11, United States Code Section 1141(a):

(a) Except as provided in subsections (d)(2 and (d) (3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

U.S. Const. amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. article VI, clause 2:

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

Petitioner Boatmen's National Bank of St. Louis is a national banking association, with its principal place of business in St.

Louis, Missouri. Boatmen's National Bank of St. Louis is the successor in interest to all assets and liabilities of Centerre Bank, N.A., f/k/a The First National Bank of St. Louis, and all are collectively referred to herein as "Boatmen's." Respondent Garland Carver is the Trustee for the bondholders of the City of Mount Pleasant, Iowa, Industrial Development Revenue Bond Issue for SAI Corporation ("Mount Pleasant Bondholders") and Trustee for the bondholders of the City of Gilman, Iowa, Industrial Development Revenue Bond Issue for SAI Corporation ("Gilman Bondholders").

On March 7, 1983, a corporation known as SAI Corporation ("SAI") filed a petition for relief under Chapter 11 of the United States Bankruptcy Code in the United States District Court for the Southern District of Iowa. Boatmen's and the Federal Deposit Insurance Corporation, as successor in interest to Mount Pleasant Bank (collectively referred to herein as "Mount Pleasant Bank"), filed a joint claim in the SAI bankruptcy for approximately \$819,917.00. This joint claim was secured by SAI's real estate, equipment, inventory, accounts receivables and other collateral of SAI. Boatmen's and Mount Pleasant Bank acted as joint lenders to SAI pursuant to a joint loan agreement.

On December 8, 1983, Respondent filed his motion to intervene in the bankruptcy proceeding to pursue claims on behalf of the Mount Pleasant Bondholders for approximately \$820,000.00 and the Gilman Bondholders for approximately \$895,000.00.

On March 4, 1986, SAI filed its First Amended and Fully Substituted Disclosure Statement and First Amended and Fully Substituted Plan of Reorganization. Boatmen's and Mount Pleasant Bank were classified as Class 1 secured claimants. The Mount Pleasant Bondholders and the Gilman Bondholders were classified as Class 2 and Class 3 secured claimants, respectively. Boatmen's, Mount Pleasant Bank, the Mount Pleasant Bondholders and the Gilman bondholders were all classified as

unsecured, Class 9 claimants for all amounts in excess of the value of SAI collateral.

In this First Amended Plan of Reorganization, it was proposed that Boatmen's and Mount Pleasant Bank's Class 1 claim "be settled and satisfied" by paying to them certain amounts which included an assignment by SAI of \$61,000.00 due to SAI from a settlement with another company. The plan provided that the Mount Pleasant Bondholders' claim would be satisfied by payments received from foreclosed SAI property, except for a remaining deficiency of \$253,224.29. This deficiency was treated as an unsecured, Class 9 claim. The plan also provided that the Gilman Bondholders' claim would be "settled and satisfied" by payment of \$400,000.00 on the effective date of the plan, with the remaining unsecured portion of that claim treated as a Class 9 claim.

All of the Class 9 claims were to be "settled and satisfied" by paying these claimants a pro rata share of \$5,000.00 on the effective date of the plan and a pro rata share of \$10,000.00 on August 1, 1990. The SAI First Amended Plan of Reorganization, and the subsequent amendments thereto, are located at Appendix G.

On July 8, 1986, the bankruptcy court entered its order confirming SAI's First Amended Plan of Reorganization. (Attached hereto as Appendix H). Boatmen's, Mount Pleasant Bank and a majority of the Mount Pleasant and Gilman Bondholders voted to accept the plan. At no time during the SAI reorganization proceedings did Respondent file any objection to SAI's First Amended Plan of Reorganization, the bankruptcy court's order approving SAI's reorganization plan, or the bankruptcy court's order confirming SAI's First Amended Plan of Reorganization. Respondent did not file an appeal challenging the plan or the bankruptcy court's orders.

On July 11, 1986, three days after the bankruptcy court entered its order confirming SAI's First Amended Plan of

Reorganization, Respondent Carver added Boatmen's as a party defendant in a "lender liability" action instituted by Respondent for the Bondholders, initially filed in the District Court of Henry County, Iowa against Mount Pleasant Bank. Respondent sought damages for, *inter alia*, certain alleged fraudulent conveyances, fraud, and breach of a fiduciary duty owed by Mount Pleasant Bank to the Bondholders. Mount Pleasant Bank was originally the named trustee for the Mount Pleasant Bondholders and the Gilman bondholders. Boatmen's liability for breach of fiduciary duty was premised upon allegations that Boatmen's, acting as a joint lender to SAI with Mount Pleasant Bank, actively participated in Mount Pleasant Bank's breach of fiduciary duty.

From October 25, 1988 to October 27, 1988, the trial court conducted a non-jury trial. On February 2, 1989, the trial court issued its proposed findings of facts and conclusions of law. It found Boatmen's liable, as a constructive fiduciary, for breach of a fiduciary duty owed by Mount Pleasant Bank to the Bondholders.

Based upon accountings submitted by the parties, the trial court awarded the Bondholders \$138,650.00 in damages, jointly and severally, against Mount Pleasant Bank and Boatmen's. No amount awarded to Boatmen's in SAI's First Amended Plan of Reorganization was included in the damage computation. The trial court specifically found that Respondent was not entitled to include in the damage computation two items sought by Respondent: the \$61,000 assigned to Boatmen's via the SAI confirmed plan of reorganization;¹ and \$100,000 which was allegedly received by Boatmen's based upon SAI's pre-bankruptcy liquidation of rolling stock. See Appendix pp. A-43 - A-45. The trial

¹ Respondent specifically sought to recover the \$61,000 for the first time, post-trial, during a hearing on the parties' post-trial motions. The trial court rejected the inclusion of this item of damages because, *inter alia*, Respondent failed to establish Boatmen's receipt of the \$61,000 at trial.

court concluded that there was insufficient evidence presented by Respondent justifying these items of damages.

On April 28, 1989, Boatmen's appealed the trial court's finding of liability. Respondent appealed the trial court's computation of the damage award. Respondent sought to include in the damage computation the \$61,000.00 assigned to Boatmen's in the SAI plan of reorganization and the \$100,000.00 which Boatmen's allegedly received from the liquidation of SAI rolling stock.

In opposition to Respondent's attempt to include these additional amounts, Boatmen's argued that Respondent was barred by 11 U.S.C. §1141(a) from recovering any amounts awarded to Boatmen's in the SAI reorganization because Respondent failed to object during the bankruptcy proceedings. Boatmen's also argued that the trial court correctly concluded that Respondent failed to prove Boatmen's received an additional \$100,000 resulting from the liquidation of SAI rolling stock.

On April 18, 1990, the Iowa Supreme Court issued its opinion affirming the trial court's award of \$138,650.00. The Iowa Supreme Court also added to the damage computation the \$61,000.00 assigned to Boatmen's pursuant to the SAI plan of reorganization and the \$100,000.00 which Boatmen's allegedly received from the liquidation of SAI rolling stock.² In address-

² The trial court, in an attempt to return the parties to their relative positions prior to the breach of fiduciary duty, computed damages by first calculating the Bondholders' *pro rata* share of SAI's total indebtedness. This *pro rata* share, which the trial court determined to be 59 percent, was then multiplied by \$235,000 — the amount the trial court found Mount Pleasant Bank and Boatmen's improperly received from SAI. This computation resulted in an initial judgment against Boatmen's in the amount of \$138,650, plus interest. The net effect of the Iowa Supreme Court's decision is that the total amount improperly received was increased by an additional \$161,000, resulting in an increase in actual damages of approximately \$95,000, plus interest. On remand, the trial court, in accordance with the Iowa Supreme Court's directives, entered a final judgment against Boatmen's on July 5, 1990 for \$383,835.51.

ing the trial court's finding that Respondent did not present sufficient evidence to justify these additional items, the Iowa Supreme Court held that because Boatmen's was found liable as a constructive fiduciary, Boatmen's had the burden of disproving Respondent's entitlement to these items of damages.

On April 30, 1990, Boatmen's filed its Petition for Rehearing, arguing that the Iowa Supreme Court improperly added to the damage computation the \$61,000.00 which the Iowa Supreme Court found Boatmen's received from the SAI plan of reorganization. Boatmen's noted that the Iowa Supreme Court ignored the *res judicata* effect of the bankruptcy court's order confirming the SAI plan of reorganization. Boatmen's also argued that the shifting of the burden of proof on appeal, coupled with the court's failure to remand the case to afford Boatmen's an opportunity to maintain this burden, was fundamentally unfair and violated the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

On May 23, 1990, the Iowa Supreme Court denied Boatmen's Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

I.

THE IOWA SUPREME COURT'S DECISION, WHICH REALLOCATES BETWEEN COMPETING CREDITORS PROCEEDS SPECIFICALLY AWARDED BY THE BANKRUPTCY COURT WITHOUT OBJECTION, DIRECTLY CONFLICTS WITH 11 U.S.C. §1141(a) AND UNANIMOUS FEDERAL COURT DECISIONS MANDATING THAT CONFIRMED PLANS OF REORGANIZATION BE GIVEN RES JUDICATA EFFECT

This Court should grant certiorari in this case because the Iowa Supreme Court's decision conflicts with federal court decisions which have unanimously held that a final, confirmed plan of reorganization must be given *res judicata* effect. The Iowa Supreme Court, by reallocating to Respondent monies specifically awarded pursuant to SAI's final plan of reorganization, has ignored the *res judicata* effect of that final plan as required by 11 U.S.C. §1141(a) and has permitted the unwarranted modification and/or collateral attack on the bankruptcy court's order. If this decision is permitted to stand, Iowa courts, as well as those in other states, will be able to rely upon this decision to usurp federal law by reallocating monies awarded to competing creditors pursuant to final bankruptcy reorganization plans, thereby creating the very uncertainty with respect to these final plans of reorganization that §1141(a) was enacted to eliminate. Such flagrant disregard for a binding federal statutory provision and clear federal precedent mandating *res judicata* application should be reviewed and sternly rebuked by this Court.

This Court has repeatedly recognized the general proposition that an arrangement confirmed by a bankruptcy court has the effect of a judgment rendered by a district court and that any attempt by the parties or those in privity with them to litigate any of the matters that were raised or could have been raised is bar-

red by the doctrine of *res judicata*. In *Stoll v. Gottlieb*, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 (1938), a bankruptcy court confirmed a debtor's reorganization plan that discharged certain gold bonds and cancelled the guarantee endorsed on them by a third party. The respondent, one of the bondholders, did not appear at the hearing on the plan which was ultimately confirmed. The confirmation was not appealed.

Following the confirmation, the bondholder successfully pursued a state court action to enforce the guaranty. The guarantor appealed to the Supreme Court of Illinois which held that the bondholder was entitled to enforce the guarantee and rejected the guarantor's defense of *res judicata*. *Id.* at 169, 83 L.Ed. at 107.

Reversing the Illinois Supreme Court, this Court concluded that the final, confirmed plan of reorganization barred the bondholder from relitigating the guarantor's liability on the bonds. The Court held:

" . . . where the judgment or decree of the Federal court determines a right under a Federal statute, that decision is 'final until reversed in an appellate court or modified or set aside in the court of its rendition' [footnote omitted]. As this plea was based upon an adjudication under the reorganization provisions of the Bankruptcy Act, effect as to *res judicata* is to be given the Federal order if it is concluded it was an effective judgment in the court of its rendition. . . . In this particular case, a Federal question was involved. This was the power of the Federal court to protect those who come before them relying upon constitutional rights or rights given, as in this case, through a statute enacted pursuant to constitutional grants of power."

Id. at 171, 83 L.Ed. at 108.

This Court again addressed the *res judicata* effect of a confirmed plan of reorganization in *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317, 84

L.Ed. 329 (1939). In *Chicot County Drainage District*, a bankruptcy court entered an order cancelling the debtor's bond obligations if not claimed by the bondholders within one year. The record showed that the bondholders were given notice of the action and had a full opportunity to object to the proceedings. *Id.* at 375, 84 L.Ed. at 333. No bondholder objected to the final, confirmed plan.

After the confirmation of the plan, the courts ruled that the statute giving subject matter jurisdiction to the bankruptcy court was unconstitutional. Some of the bondholders then sued to enforce the bonds, claiming that the cancellation was void because the bankruptcy court lacked subject matter jurisdiction.

In rejecting the bondholders' challenge to the bankruptcy court's order cancelling the debtor's bond obligations, this Court stated: "If the general principles governing the defense of *res judicata* are applicable, these bondholders, having the opportunity to raise the question of invalidity, would not be less bound by the decree because they failed to raise it." 308 U.S. at 375, 84 L.Ed. 333.

In addressing the scope of the bankruptcy court's order, the Court stated:

"The remaining question is simply whether [the bondholders] having failed to raise the question in the proceeding to which they were a party and to which they could have raised it and have it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-established principle that *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end.' "

Id. at 378-379, 84 L.Ed. at 334-335.

Since those decisions by this Court, the federal courts have unanimously held that a final, confirmed plan of reorganization bars the relitigation of any matters that were raised or could have been raised in the bankruptcy proceedings. See, e.g., *In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1552 (11th Cir. 1990) (claims by guarantors in adversary proceeding seeking equitable lien and equitable subordination, by alleging that mortgagee engaged in fraudulent and inequitable conduct and that mortgagee was not a secured creditor, were or could have been raised in guarantor's objection to confirmation of Chapter 11 plan, and thus, doctrine of claim preclusion barred guarantors from relitigating claims in adversarial proceedings); *Republic Supply Company v. Shoaf*, 815 F.2d 1046, 1050-1051 (5th Cir. 1987) (creditor seeking to appeal confirmed bankruptcy plan for review on its merits, which did not object to inclusion of a release provision in reorganization plan and did not appeal confirmation, was foreclosed from raising questions of propriety or legality of confirmation order in collateral proceeding, although the question of release was not actually litigated); *Miller v. Meinhard-Commercial Corporation*, 462 F.2d 358, 360 (5th Cir. 1972) ("An arrangement confirmed by a bankruptcy court has the effect of a judgment rendered by a district court, . . . and any attempt by the parties or those in privity with them to relitigate any of the matters that were raised or could have been raised therein is barred under the doctrine of *res judicata*"); *Matter of GEX Kentucky, Inc.*, 100 B.R. 887, 888-889 (Bankr.N.D.Ohio 1988) (order confirming debtor's reorganization plan was *res judicata* as to claimant's order of payment, and barred creditor who had voted to accept plan from subsequently bringing complaint for equitable subordination of claims treated under the plan); *In re Sanders*, 81 B.R. 496, 498 (Bankr.W.D.Ark. 1987) ("An order confirming a chapter 11 plan from which there is no appeal is generally regarded as an order that is entitled to full faith and credit by other courts and is *res judicata* as to all questions pertaining to such plan which were raised or could have been raised"). See also 5 *Collier on*

Bankruptcy, §1141.01[1] (15th Ed. 1987) ("Section 1141(a) of the Code has the same effect as Sections 224(1), 367(1) and 473(1) of the Bankruptcy Act in that a plan is binding upon all parties once it is confirmed and all questions which could have been raised pertaining to such plan are *res judicata*.").

In *In re Astroglass Boat Company, Inc.*, 32 B.R. 538 (Bankr.M.D.Tenn. 1983), the bankruptcy court noted the important federal policy supporting the doctrine of *res judicata* as it pertains to confirmed plans of reorganization: "[T]he success of a corporate reorganization demands finality to the order of confirmation. Confirmation often signals the restructuring of debt and the infusion of new capital. The execution of new contracts and loan agreements *requires certainty for all parties involved*." *Id.* at 543-544 (emphasis added).

Therefore, federal court decisions and 11 U.S.C. §1141(a) provide strong support for Boatmen's position that Respondent is barred, by the doctrine of *res judicata*, from recovering via a final Iowa Court judgment monies specifically awarded to Boatmen's in the SAI confirmed plan of reorganization. Respondent had ample opportunity to object to SAI's First Amended Plan of Reorganization, but chose not to do so. Respondent not only failed to object to the plan, but also voted in favor of that plan. Nor did Respondent appeal the bankruptcy court's order specifically assigning the \$61,000.00 to Boatmen's.

The Iowa Supreme Court may not, in light of §1141(a), reallocate to Respondent monies specifically assigned to Boatmen's in the SAI bankruptcy proceeding. That reallocation of bankruptcy proceeds constitutes a collateral attack upon the bankruptcy court's order confirming the plan of reorganization, thereby challenging the integrity of this final, federal court judgment. The SAI confirmed plan of reorganization settled the claims between all parties regarding which creditor was entitled to the \$61,000. This settlement extinguished Respondent's claim to all portions of the \$61,000, thereby br-

inging the Iowa court's decision directly in conflict with this final federal court order, 11 U.S.C. §1141(a), and federal case law. See, e.g., *In re Lift & Equipment Service, Inc.*, 816 F.2d 1013, 1018 (5th Cir. 1987) ("[Secured creditor's] acquiescence in the settlement agreement permitted the surrender of valuable equipment, equipment which would have remained in bankruptcy estate for the benefit of all creditors. Were we to recognize [secured creditor's] claimed security interest in the . . . funds, the estate would be depleted of both those funds and the equipment, to the prejudice of unsecured creditors"); *Bohack Corp. v. Iowa Beef Processors, Inc.*, 715 F.2d 703, 712 (2nd Cir. 1983) (Court upholds trial court's determination that confirmation of reorganization plan extinguished creditor's reclamation counterclaim where such claim was not expressly reserved in the confirmation plan); *In re Astroglass Boat Co., Inc.*, 32 B.R. 538, 543, n.8 (Bankr. M.D. Tenn. 1983) ("Because the prompt resolution of claims and disputes makes the compromise of claims of particular importance in a bankruptcy reorganization, . . . settlements of claims should be liberally construed and enforced").

Hence, the Iowa courts are clearly required by §1141(a) and the supremacy clause to give *res judicata* effect to the bankruptcy court's plan of reorganization. This petition raises a substantial question of federal law regarding the import and scope of §1141(a), and, as noted by this Court in *Stoll*, the protections afforded by a final bankruptcy judgment to participants in bankruptcy proceedings.

There are two other important considerations justifying review by this Court. First, this question is one involving solely a construction of federal bankruptcy law, as opposed to state law. See, e.g., *Kalb v. Feuerstein*, 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370 (1934) (a determination by a state court of the question of whether a provision of the Bankruptcy Act operates as an automatic stay of foreclosure proceedings in state courts presents a Federal question subject to review by the Supreme

Court). Second, the Iowa Supreme Court, by ignoring §1141(a), has created a conflict between its decision, which reallocates bankruptcy proceeds, and the confirmed plan of reorganization, federal bankruptcy code provisions, and federal court decisions mandating that *res judicata* effect be given to a confirmed reorganization plan. A conflict between a state supreme court decision and that of this Court or federal courts of appeal on a question of federal law has been deemed an overwhelming consideration in granting review by certiorari. See *Limbach v. Hooven & Allison Company*, 466 U.S. 353, 364, 104 S.Ct. 1837, 80 L.Ed.2d 356 (1984); and *Pittsburgh v. Alco Parking Corporation*, 417 U.S. 369, 371-372, 94 S.Ct. 2291, 41 L.Ed.2d 132 (1974). Because the Iowa Supreme Court ignored this important question of federal law, it is now imperative on this Court to entertain Boatmen's petition for a writ of certiorari.

II.

THE IOWA SUPREME COURT'S PROCEDURE OF SHIFTING THE BURDEN OF PROVING DAMAGES AND FAILURE TO REMAND THE CASE TO AFFORD BOATMEN'S AN OPPORTUNITY TO MAINTAIN THAT BURDEN CONSTITUTES AN EGREGIOUS DEPARTURE FROM WELL-ESTABLISHED LEGAL STANDARDS UNDER IOWA AND FEDERAL LAW, AND THEREBY DEPRIVED BOATMEN'S OF FEDERAL DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW.

The Iowa Supreme Court, concluding that Boatmen's breached a constructive fiduciary duty owed to the Mount Pleasant and Gilman Bondholders, held that the burden of proof with regard to one component of damages — the alleged receipt of \$100,000 from the liquidation of SAI rolling stock — should be shifted to Boatmen's. This holding was also implicitly applied to the \$61,000 because the trial court concluded that there was

insufficient evidence in the record to support such a recovery. The Iowa Supreme Court concluded that shifting the burden of proof is permissible under Iowa law because Boatmen's was deemed a constructive fiduciary and because Boatmen's was in possession of superior knowledge. This conclusion was contrary to the trial court which concluded that the burden of proof rested with Respondent and that there was insufficient evidence in the record to support these additional items. While shifting the burden of proof to Boatmen's, however, the Iowa Supreme Court denied Boatmen's request to remand the case to afford Boatmen's an opportunity to maintain its burden of proving that Respondent was not entitled to include these items in the damage computation.

This Court should entertain Boatmen's petition for certiorari because of two errors of constitutional dimension committed by the Iowa Supreme Court: (i) the Iowa Supreme Court improperly imposed the burden of disproving damages on Boatmen's, contrary to well established principles under both Iowa law and federal law that a party bears the burden of proving that an alleged tortfeasor's wrongful conduct resulted in damages to the plaintiff; and (ii) Boatmen's should have been permitted the opportunity upon remand to disprove Respondent's entitlement to these items of damages. The net effect of these errors by the Iowa Supreme Court deprived Boatmen's of its right to due process, as guaranteed by the Fourteenth Amendment to the United States Constitution. Moreover, all Iowa civil defendants prior to Boatmen's have been afforded the protections of the rule that a plaintiff bears the burden of proving damages. This disparity in treatment between those defendants and Boatmen's renders the shifting of the burden of proof violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution.

The due process clause of the Fourteenth Amendment forbids, *inter alia*, egregious departures from accepted standards of legal justice. See, e.g., *Bell v. Duckworth*, 861 F.2d 169 (7th

Cir. 1988) (recognizing this principle in criminal law context). The Iowa Supreme Court deviated from those accepted standards of legal justice by, contrary to both Iowa state law and federal law, shifting the burden of proof as to damages.

The Iowa courts have consistently held that a plaintiff bears the burden of proving damages resulting from a tortfeasor's wrongful conduct by: (1) establishing the value of each item of damage with some reasonable measure of certainty; and (2) presenting proof as to the amount of the alleged damages. See, e.g., *Dumont v. Keota Farmers Cooperative*, 447 N.W.2d 402, 406 (Iowa 1989) ("The plaintiff bears the burden of establishing a claim for damages with some reasonable certainty and for demonstrating a rational basis for determining their amount"); *Muchmore Equipment, Inc. v. Grover*, 315 N.W.2d 92, 101 (Iowa 1982) (Iowa Supreme Court affirms trial court's denial of damages despite the court's finding that the party undoubtedly sustained substantial damages where party failed to prove items of damages); *B-W Acceptance Corporation v. Saluri*, 139 N.W.2d 399, 404 (Iowa 1966) ("In order to be entitled to an award of damages, the claiming party has the burden of proving the value of the damages as to each item with some reasonable measure of certainty"). This general rule regarding the burden of proving damages has also been applied by the Iowa Supreme Court in breach of fiduciary duty cases. See, e.g., *Poulsen v. Russell*, 300 N.W.2d 289, 294-295 (Iowa 1981) (The Iowa Supreme Court, in a case where the burden was placed on defendant fiduciary to establish that he did not violate his fiduciary duties, nonetheless concluded that "[t]o support an award of actual damages, the plaintiff must prove that damages have been sustained").

The federal courts have also uniformly adopted the principle that a plaintiff maintains the burden of proving that he has suffered a loss as a result of a defendant's alleged wrongdoing. See *Blake v. Robertson*, 94 U.S. 728, 734, 24 L.Ed. 245, 247 (1877) ("Damages must be proved; they are not to be presumed.");

Cincinnati Fluid Power, Inc. v. Rexnord, Inc., 797 F.2d 1386, 1393 (6th Cir. 1986) ("It is elementary that evidence of damage which is remote or speculative may not be used to prove a loss. Rather, a plaintiff must present facts from which the loss may be reasonably calculated."); *Tom Shaw, Inc. v. Derecktor*, 639 F.Supp. 1064, 1067 (D.R.I. 1986) ("... it is axiomatic that Plaintiff has the burden of proving damages by a fair preponderance of the evidence. Damages must be proved. They are not to be presumed."); *Casco Bank & Trust Company v. Bank of New York*, 584 F.Supp. 763, 767 (D. Maine 1984) ("As in any civil case, the burden of proving both causation and extent of damages is upon the plaintiff"); and *In re Slefco*, 107 B.R. 628, 645 (Bankr.E.D. Ark. 1989) ("A party seeking damages has the burden of proving the claim, not just a right to claim. If no proof is presented to the trial court that would allow it to fix damages in dollars and cents the court cannot award damages.").

The Iowa Supreme Court's shifting of the burden of proof as to damages constituted an egregious departure from accepted standards of legal jurisprudence established under both Iowa law and federal law. Consequently, such a departure violated Boatmen's right to due process under the Fourteenth Amendment of the United States Constitution.

In justifying its decision shifting the burden of proof as to damages to Boatmen's, the Iowa Supreme Court purportedly relied upon two prior Iowa decisions: *Clinton Land Company v. M/S Associates, Inc.*, 340 N.W.2d 232 (Iowa 1983); and *Haynes v. Dairyland Mutual Insurance Company*, 199 N.W.2d 83 (Iowa 1972). However, neither *Clinton Land Company* nor *Haynes* stands for the proposition that a plaintiff is relieved of maintaining his burden of establishing damages by simply demonstrating a breach of a constructive fiduciary relationship. In fact, Boatmen's has uncovered no Iowa decision shifting the burden of proving damages from a plaintiff to a defendant.

Furthermore, while relying upon the *Haynes* case to justify shifting the burden of proof as to damages to Boatmen's, the Iowa Supreme Court ignored the fact that in *Haynes* a remand was required in "the interests of justice" because of the uncertainty and complexity of Iowa law regarding whether the insured or the insurer should bear the burden of proving the satisfaction of policy conditions precedent and the fact that this "central factual issue" remained unresolved. *Id.* at 87. The Iowa Supreme court remanded that case, even though the insurer rested without presenting any evidence and successfully moved for a directed verdict after the insured failed to present evidence supporting the fulfillment of necessary conditions precedent, because this unresolved central factual issue, coupled with the uncertainty regarding which party had the burden of proof, necessitated a retrial in that action. *Id.* Thus, *Haynes* supports Boatmen's contention that federal due process mandated a remand of this action to the trial court after shifting the burden of proof on appeal to Boatmen's.

This Iowa decision represents the only instance where an Iowa court has shifted the burden of proving damages from a plaintiff to a defendant. By singling out Boatmen's for this "special" procedural treatment, while recognizing in all other cases that a defendant is not required to disprove a tort plaintiff's entitlement to damages, the Iowa Supreme Court's ruling has impermissibly deprived Boatmen's of the equal protections afforded all other civil defendants under Iowa law. *See generally Shelly v. Kraemer*, 334 U.S. 1, 17-18, 68 S.Ct. 836, 92 L.Ed. 1161, 1182-1183 (1948) (State judicial action is not immunized from operation of Fourteenth Amendment simply because it is taken pursuant to state's common law policy). *See also Dean Tarry Corp. v. Friedlander*, 650 F.Supp. 1544, 1552 (S.D.N.Y. 1987) ("Equal protection rights may be violated by gross abuse of power, invidious discrimination, or fundamentally unfair procedures").

The Iowa Supreme Court's decision, by presuming liability premised upon the existence of a constructive, as opposed to actual, fiduciary relationship between Boatmen's and the Bondholders, coupled with the presumption that the Bondholders were damaged to the extent of the \$100,000 allegedly generated from the liquidation of SAI rolling stock and \$61,000 assigned to Boatmen's in the SAI bankruptcy, constitutes an egregious departure from well-established federal and Iowa state law principles regarding a plaintiff's burden of proving damages. This Court has granted certiorari where it was alleged that certain well-established federal legal standards have been misapprehended or grossly misapplied. *See, e.g., Mobil Oil Co. v. FPD*, 417 U.S. 283, 292, 94 S.Ct. 2328, 41 L.Ed.2d 72 (1974) (Court granted review of a claim that the lower court misapprehended and misapplied the substantial evidence standard in reviewing administrative findings). *See also* Supreme Court Rule 17.1(a) (Indicating that an important consideration for granting certiorari exists when "a federal court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision").

That reasoning should apply equally to gross misapplications of well-established state law procedures which implicate federal due process and equal protection concerns. Such an egregious departure from, and gross misapplication of, fundamental American legal jurisprudence screams for review in this Court because of the dangerous precedent established by that ruling as it pertains to the broader and newly-evolving area of "lender liability."

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari directed to the Iowa Supreme Court should be granted.

Respectfully submitted,

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Appearing on the Petition:
Ronald A. Norwood



APPENDIX

APPENDIX A

SUBSIDIARIES OF BOATMEN'S BANCSHARES, INC.

The following is a list of direct subsidiaries of Boatmen's Bancshares, Inc:

Subsidiary	State or Other Jurisdiction of Incorporation
Boatmen's National Bank of Belleville	United States
Boatmen's National Bank of Benld	United States
Boatmen's Bank of Benton.....	Illinois
Boatmen's First National Bank of Kansas City	United States
The Boatmen's National Bank of Springfield	United States
The Boatmen's National Bank of St. Louis.....	United States
Boatmen's National Bank of Boonville	United States
Boatmen's Bank of Butler	Missouri
Boatmen's National Bank of Cape Girardeau	United States
Boatmen's Bank of Carthage	Missouri
Boatmen's National Bank of Cassville	United States
Boatmen's National Bank of Charleston	United States
Boatmen's Bank of Columbia	Missouri
Boatmen's Bank of Delaware.....	Delaware
Boatmen's National Bank of Hillsboro	United States
Boatmen's Bank of Kennett	Missouri
Boatmen's National Bank of Lebanon.....	United States
Boatmen's Bank of Lexington	Missouri

Boatmen's Bank of Marshall	Missouri
Boatmen's Mountain Grove National Bank	United States
Boatmen's Bank of Mt. Vernon	Illinois
Boatmen's National Bank of Neosho	United States
Boatmen's Bank of Nevada	Missouri
Boatmen's Bank of Pulaski County	Missouri
Boatmen's Bank of Quincy	Illinois
Boatmen's National Bank of Richmond	United States
Boatmen's Bank of Rolla	Missouri
Boatmen's Tri-Lakes Bank	Missouri
Boatmen's Bank of Tennessee	Tennessee
Boatmen's Bank of Troy	Missouri
Boatmen's Bank of Vandalia	Missouri
Boatmen's First National Bank of West Plains	United States
Boatmen's Bank of Zigler	Illinois
Benefit Plan Services, Inc.	Missouri
Boatmen's Insurance Agency, Inc.	Missouri
Boatmen's Life Insurance Company	Missouri
Boatmen's Mortgage Corporation	Missouri
Boatmen's Trust Company	Missouri
Boatmen's Community Development Corporation	Missouri
Monetary Transfer System (Joint Venture—40.0%)	Missouri

APPENDIX B

IN THE SUPREME COURT OF IOWA

No. 86/89-643

Filed April 18, 1990

**In the Matter of the Receivership of Mt. Pleasant
Bank and Trust Company, Mt. Pleasant, Iowa**

**Re: Garland Carver, Successor Trustee for City
of Mt. Pleasant, Iowa, Industrial Development Revenue
Bond Issue (SAI Project) and City of Gilman, Iowa,
Industrial Development Revenue Bond Issue (SAI Project),
Appellants,**

vs.

**Federal Deposit Insurance Corporation, as Receiver of
the Mt. Pleasant Bank and Trust Company; and
Centerre Bank, N.A. f/k/a First National Bank in St. Louis,
Appellees.**

**Appeal from the Iowa District Court for Henry County,
David B. Hendrickson, Judge.**

**Action in equity asserting breach of fiduciary duty of bonding
trustee. **AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED.****

**Mark E. Schantz and Jon P. Sullivan of Dickinson,
Throckmorton, Parker, Mannheimer & Raife, P.C., Des
Moines, for appellants.**

**Michael Noyes and Patrick J. Flynn of Stanley, Rehling &
Lande, P.C., Davenport, Ann S. DuRoss, Assistant General
Counsel, and Sharon Powers Sivertsen, Washington, D.C., for
appellee FDIC.**

F.L. Burnette II and Randall G. Horstmann of Nyemaster, Goode, McLaughlin, Vigts, West, Hansell & O'Brien, P.C., Des Moines, for appellee Centerre Bank.

Considered by Harris, P.J., and Schultz, Carter, Snell, and Andreasen, JJ.

HARRIS, J.

A failed bank had served as trustee for bondholders who invested in a local industry. A successor trustee brought this equity action against the bank and a second bank which participated in loaning funds to the industry. The action is based on theories of breach of fiduciary duty. The district court ruled in favor of plaintiff trustee and fashioned a remedy intended to restore the parties to the status quo prior to the breach of fiduciary duty. We affirm in part, reverse in part, and remand for further proceedings.

On our de novo review we reach the same factual findings as those found by the district court. Except as they relate to the extent of participation by the second bank, a matter vigorously contested, they are to a considerable extent undisputed. SAI, an Iowa corporation with main offices at Mt. Pleasant, produced insulation material. It had three subsidiaries, one at Gilman, Iowa, and two at Mt. Pleasant.

SAI relied on two industrial development bonds to acquire facilities in both towns. The City of Mt. Pleasant issued \$1 million in bonds to finance construction of a local facility. The City of Gilman issued \$1 million in bonds for purchase of an existing facility there. The bonds were to be retired over a period of fifteen years in semiannual installments. The bonds in each case were secured by the facilities for which they were issued.

The Mt. Pleasant Bank & Trust Co. (Mt. Pleasant Bank) executed indentures of trust with each city, under which it undertook to act as trustee for the loans by both cities to SAI and its subsidiaries. By the indenture Mt. Pleasant Bank was assigned

and accepted the rights of each city to enforce the terms of each bond loan.

SAI also borrowed money for operating capital. Term and credit loans for this purpose were provided by two banks acting jointly: Mt. Pleasant Bank and Centerre Bank of St. Louis (formerly known as the First National Bank of St. Louis). Mt. Pleasant loaned SAI \$1 million for this purpose; Centerre loaned \$1,500,000.

Mt. Pleasant Bank executed a participation agreement with Centerre in connection with the joint bank loans whereby Mt. Pleasant Bank agreed to service and collect the bank loans for itself and as agent for Centerre. Mt. Pleasant Bank was thus responsible for the collection of both its own and Centerre's loan to SAI, and at the same time also owed the bondholders a fiduciary duty to collect the SAI bond loans.

This litigation stems from tension from these conflicting duties. Plaintiffs allege Mt. Pleasant Bank—with Centerre's participation—acted to favor collecting SAI's debt for operating capital by sacrificing the interests of the bondholders.

Plaintiffs' claim became apparent after August 6, 1982, when Mt. Pleasant Bank was ordered closed and went into receivership. The federal deposit insurance corporation (FDIC) was appointed receiver. Garland Carver was thereafter appointed successor trustee for the bondholders and later brought this action. For clarity we hereafter refer to the plaintiff trustee as the bondholders.

Severe economic losses for the fiscal year ending June 30, 1979 (\$1,756,960 pretax loss; \$929,260 after tax loss; and \$1,375,597 loss in working capital) placed SAI in breach of various financial covenants in its bank loan agreement. To prevent these defaults from being noted in SAI's annual audit Mt. Pleasant Bank and Centerre waived the defaults by letter. No mention of the losses by SAI, or the default they caused under SAI's bank loans, was made to any of the bondholders.

Because of increasing concern over SAI's deteriorating financial condition Centerre closely monitored the operation. A Centerre loan officer was often in Mt. Pleasant in late 1979 and early 1980 and knew the Mt. Pleasant facility had never been profitable and was then closed down. At this point Centerre took the lead from Mt. Pleasant Bank in their joint efforts to collect the bank loans.

The extent of Centerre's aggressive leadership in this effort is crucial to the bondholders' recovery. As will be hereafter explained, Centerre's liability to the bondholders hinges on its participation in the exploitation of Mt. Pleasant Bank's fiduciary status.

SAI's fiscal year ending June 30, 1980, showed continuing financial deterioration. On July 30, 1980, Centerre notified both SAI and Mt. Pleasant Bank that Mt. Pleasant and Centerre's credit loan would not be renewed when it became due September 30, 1980, and that the balance of the term loan would also then be due. Centerre's call of the loans was based on SAI's deteriorating financial condition; no interest or principal payments had been missed. The loan call was decided by Centerre; Mt. Pleasant Bank went along with reluctance. Nothing was done to notify bondholders of SAI's plight. Notwithstanding Mt. Pleasant Bank's growing conflict of interest it did not withdraw as trustee.

However justified it may have been as a sound banking practice, the decision to call the bank loan was eventually fatal to SAI's operation. It cut off SAI's sole source of credit for its day-to-day operations. The closing down of operations was long delayed, however, because the banks jointly agreed to forbear notifying SAI's account debtors to make receivable payments directly to the banks. The banks agreed to, and did, delay this action from July 30, 1980, until the spring of 1983. When notifications were finally given to the creditors in 1983 SAI promptly filed for chapter eleven bankruptcy.

The bondholders were hurt by this delay. Real estate taxes on the secured property went unpaid, a violation of the loan agreements with the cities. The position of the banks improved relative to that of the bondholders. The banks used this time to obtain any unencumbered SAI assets. The banks demanded and SAI granted a security interest in all SAI's general intangibles which had been previously unencumbered. These included a 1980 income tax refund (asserted to be \$125,000) and a stock option (asserted to be \$695,331). Rolling stock in the form of tractor-trailer units was also liquidated and paid to the bank. During much of this time the bondholders were deterred from moving to protect themselves by the banks' conduct. The importance to the bondholders of doing so was concealed because SAI, notwithstanding its plummeting condition, was allowed to come up with scheduled bond payments while the banks obtained the unencumbered assets.

When SAI was late in making its bond payment due November 1, 1981 (notwithstanding loans by the banks which ultimately enabled SAI to make this payment) a notice was finally sent to the half dozen bondholders for whom the Mt. Pleasant Bank had an address. The notice purported to advise the Gilman bondholders that the payment due "September 1, 1981 [1982?]" was not made by SAI. Although the letter was dated October 30, 1981, it was not mailed until November 2, 1981. And before it was mailed the following notation was added at the bottom: "Received payment for bonds and coupons on 11-2-81."

Three inquiries resulted from this handful of notices. Bondholders requesting information were assured by Mt. Pleasant Bank that payments owing on the issue had been received and the trustee expected "no problem with future payments."

Mt. Pleasant Bank even declined to act when advised by its counsel in January 1982 to resign as trustee for one or both of the bond issues because of its irreconcilable conflict of interest.

A letter of resignation regarding the Gilman bond issue was drafted but was never mailed.

SAI did not make any of the payments required under the bond loans in the spring of 1982. It failed to make the payments of interest on the Mt. Pleasant and Gilman bond issues due on March 1, 1982, and May 1, 1982. It failed to pay real estate taxes due in March.

Mt. Pleasant Bank took money from special escrow reserve funds which the bank held as additional collateral for payment of the bonds and used it to make the payments to the bondholders which were due in March and May of 1982. No notice of any kind was given the bondholders regarding SAI's failure to make the required payments.

In August of 1982 Mt. Pleasant Bank was, as mentioned, closed and the FDIC was appointed as its receiver. When SAI failed to make its bond payments in the fall of 1982 the FDIC again utilized the special escrow reserve funds still on deposit to make interest payments to the bondholders but was prohibited by the trust indenture from using these funds to make principal payments. The FDIC as receiver of the Mt. Pleasant Bank mailed a notice of default under the bond loans to SAI. No other action was taken with respect to collection of the bond loans or foreclosure of the collateral securing the loans.

Finally, on September 23, 1983, Centerre offset the balances then on deposit in SAI's checking account at Centerre and reminded SAI in a letter that Centerre had twice, on August 3, 1980, and on June 21, 1982, demanded "payment in full" of the bank loans. Centerre's notification to SAI's account receivable debtors forced the chapter eleven bankruptcy proceeding previously mentioned. More than one year had passed since the date the banks took their security interest in the acquisition of the stock option. Because one year had passed the security interests could not be voided by a bankruptcy trustee as preferential transfers under 11 U.S.C. section 547 or as fraudulent conveyances under 11 U.S.C. section 548.

Between SAI's default on the bank loans and the bankruptcy petition the banks collected \$792,634.98 from SAI. Both banks benefited from these payments. Centerre received cash payments and Mt. Pleasant Bank benefited because each payment to Centerre increased Mt. Pleasant Bank's percentage interest in the remaining loan balance. No effort was made by either bank to segregate the payments received by way of liquidation of original collateral from payments received from additional collateral procured from SAI.

Mt. Pleasant Bank and Centerre each received payments from SAI's bankruptcy estate. These payments included proceeds from the additional collateral procured from SAI in the spring of 1981.

We agree with the district court finding that, when Centerre realized early in 1980 that SAI was in trouble, it became more actively involved in supervising and directing the loans. The two banks' subsequent efforts to seize security for their own loans, sacrificing the interests of the bondholders, was at Centerre's urging and with its direct participation. This participation was undertaken with full knowledge of Mt. Pleasant Bank's fiduciary status and consequent duty to represent and protect the interests of the bondholders. Centerre participated in exploiting the bondholders through Mt. Pleasant Bank's fiduciary status.

I. We have often held that one who is under a fiduciary relationship to another is bound to a high standard of good faith and cannot profit from the relationship beyond the agreed compensation. See e.g. *Wormhoudt Lumber Co. of Ottumwa v. Cloyd*, 219 N.W.2d 543, 545 (Iowa 1974). A trustee or fiduciary¹ is under a duty to communicate to the person to

¹ Trust principles apply in fiduciary or confidential relationships. See Restatement (Second) of Trusts § 2 comment b.

whom the duty is owed all known material facts or those material facts which should be known. Restatement (Second) of Trusts § 170(2).

Centerre does not challenge this black-letter rule but insists the case against it is based, not on primary, but secondary liability. See *Metge v. Baehler*, 762 F.2d 621, 624 (8th Cir. 1985). Centerre believes that secondary liability requires more knowledge and participation in the breach than occurred here. The contention is answered by the findings of fact we have related, which do not square with those proposed by Centerre.

It goes almost without saying that Centerre forcefully disputes the finding that it participated with Mt. Pleasant Bank to the extent we have found. Centerre insists it ~~was~~ not in league with Mt. Pleasant Bank so far as trustee activities were concerned, "that its conduct in trying to collect its own loan on its own collateral, and leaving Mt. Pleasant Bank to tend to its fiduciary duties [was] not culpable but commercially reasonable in the marketplace." Centerre cites cases which hold that a creditor is under no fiduciary obligation to the debtor or other creditors, is in fact in fair competition with other creditors. See e.g. *Crowder v. Allen-West Comm'n Co.*, 213 F. 177, 184 (8th Cir. 1914).

Centerre loses the point, not on the law, but on the facts. We have found that Centerre did not go about collecting this loan as just another creditor. It began by sharing responsibilities and collecting the loans with Mt. Pleasant Bank, then gained ascendancy in the relationship, and ended by taking full advantage of Mt. Pleasant Bank's fiduciary status. Such involvement distinguishes this case from those which allow lending institutions as a matter of prudent banking practice to proceed with vigor to collect in competition with other creditors.

The controlling rule is perhaps best stated in Restatement (Second) of Trusts section 326:

A third person who, although not a transferee of trust property, has notice that a trustee is committing a breach of trust and participates therein is liable to the beneficiary for any loss caused by the breach of trust.

We think Centerre's liability to the bondholders is clear.

II. The district court's remedy for the bondholders was intended to reestablish them in the relative position existing before any breach of loyalty occurred. To accomplish this the court first computed the bondholder's pro rata share (\$1,875,000) of SAI's total indebtedness (\$3,172,000) at fifty-nine percent. Second the court found the amount improperly received by the banks from SAI's collateral to be \$235,000 (an amount the bondholders dispute on appeal). The district court then allowed the bondholders fifty-nine percent of the \$235,000, or \$138,650. The bondholders attack the damage award as inadequate on two fronts. They first challenge the premise that the bondholders' recovery should be limited to mere restoration of the parties, contending the banks should be penalized rather than restored. The bondholders also dispute the district court finding which fixed at \$235,000 the amount of securities improperly obtained by the bank.

III. The boundaries cite a number of authorities to support the theory that recovery should be fixed so as to make it unprofitable for fiduciaries to breach their duties. See *Miller v. Berkoski*, 297 N.W.2d 334, 341 (Iowa 1980); *Wormhoudt Lumber*, 219 N.W.2d at 546.

We agree with the district court that Centerre's conduct does not call for punitive-type damages. Punitive damages are never awarded as a matter of right. Even in deliberate breach-of-contract cases the breach, standing alone, is insufficient to support a punitive damage award. *Berryhill v. Hatt*, 428 N.W.2d 647, 656 (Iowa 1988). We agree with the district court's refusal to allow recovery in an amount which would punish the banks.

IV. A more difficult problem is presented by the bondholders' challenge to the finding limiting the amount of securities obtained by the banks to \$235,000. Undergirding this challenge is a complaint with respect to placing the burden of proof. The district court assigned that burden to the bondholders, a matter they vigorously protest on appeal. As the bondholders point out the burden of proof is critical.

Although the burden-of-proof issue in this case is not without difficulties, the general rule is certainly plain. Where a fiduciary is in a position to take advantage over a principal, especially when the fiduciary has closer access to the facts, the burden "shifts to the fiduciary to show fair dealing in all matters within the fiduciary obligation." *Clinton Land Co. v. M/S Assoc., Inc.*, 340 N.W.2d 232, 233 (Iowa 1983). The key is access to the proof; the burden of proof ordinarily rests on the party who possesses the facts on the issue in dispute. See *Haynes v. Dairyland Mut. Ins. Co.*, 199 N.W.2d 83-85 (Iowa 1972).

Mt. Pleasant Bank became a fiduciary by written agreement. Centerre becomes obligated because of its participation with Mt. Pleasant Bank. Centerre undoubtedly has possession of fewer facts than Mt. Pleasant Bank but more facts than the bondholders. Under these unusual circumstances we think the burden should shift to Centerre only as to those matters with respect to which it has been shown Centerre holds specific knowledge.

From our review of the record we agree with the district court's conclusion that Centerre should be charged with profiting from the tax refund previously mentioned and agree with the district court assessment fixing the value of it at \$80,000. We also agree with the district court's conclusion that Centerre should be charged with profiting from the stock option previously mentioned and with the district court's assessment fixing its value at \$155,000. To these amounts should be added two additional amounts: an additional amount received on the

stock option from SAI's bankruptcy plan for reorganization which we find should be valued at \$61,000; and rolling stock which we find should be valued at \$100,000, a total of \$396,000. We agree with the district court that the bondholder's share of the amount should be fifty-nine percent, or \$233,640. Judgment should be entered in that amount.

V. The district court allowed interest on the judgment against Centerre but limited it to commence from the date the petition was amended to join Centerre as a party defendant. The bondholders argue that interest on the judgment should run from the time the action was commenced against the other defendants, a position they contend is called for by the plain wording of Iowa Code section 535.3 (1989). See *Bremier v. Boston Edison Co.*, 380 Mass. 372, ___, 403 N.E.2d 391, 401 (1980).

Confusion persists about the running of interest on judgments. We discussed the controlling rules in *Coachmen Industries, Inc. v. Security Trust and Savings Bank*, 329 N.W.2d 648, 650-51 (Iowa 1983), and again in *Midwest Management Corp. v. Stephens*, 353 N.W.2d 76, 82-83 (Iowa 1984). Two statutes are involved: Iowa Code sections 535.2(1)(b) (general statute for money due sets rate at five percent) and 535.3 (interest on judgments fixed at ten percent).²

Where there is a breach of fiduciary duty the aggrieved party is entitled to prejudgment five percent interest under section 535.2(1)(b) from the dates the funds were improperly diverted. *Midwest Management Corp.*, 353 N.W.2d at 81. It runs at five percent until the date the suit is filed against them. Because of

² Section 535.3 provides in material part that

[i]nterest shall be allowed on all money due on judgments and decrees of courts at the rate of ten percent per annum The interest shall accrue from the date of the commencement of the action.

the allowance of prefilings interest under section 535.2(1)(b), we think it is inappropriate to call for application of section 535.3 until the party charged is actually brought into the suit. Prefiling interest thus accrued is to be added to the amount later awarded as judgment. The sum is to draw interest under section 535.3 at the rate of ten percent from the time papers were filed (in this case against Centerre) until paid.

Upon remand interest should be computed in accordance with this opinion.

VI. The bondholders brought the direct appeal to challenge the damage award. Centerre cross-appealed to challenge any award. FDIC cross-appealed to challenge any award against Mt. Pleasant Bank. The district court correctly ruled that there is no liability against FDIC in its corporate capacity. See *Batsakis v. Federal Deposit Ins. Corp.*, 670 F. Supp. 749, 753 (W.D. Mich. 1987). We reverse and remand on the appeal. We affirm on the cross-appeal.

AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED.

APPENDIX C

IN THE SUPREME COURT OF IOWA

No. 89-643

ORDER

**In the Matter of the Receivership of Mt. Pleasant Bank
and Trust Company, Mt. Pleasant, Iowa**

**Re: Garland Carver, Successor Trustee for City of
Mt. Pleasant, Iowa, Industrial Development Revenue
Bond Issue (SAI Project) and City of Gilman, Iowa,
Industrial Development Revenue Bond Issue (SAI Project),
Appellants,**

vs.

**Federal Deposit Insurance Corporation, as Receiver of the
Mt. Pleasant Bank and Trust Company; and Centerre Bank,
N.A. f/k/a First National Bank in St. Louis,
Appellees.**

**After consideration by the court, en banc, appellee Centerre
Bank's Petition for Rehearing in the above-captioned matter is
hereby overruled and denied.**

Done this 23rd day of May, 1990.

The Supreme Court of Iowa

**/s/ Arthur A. McGiverin
Chief Justice**

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APPENDIX D

**IN THE DISTRICT COURT OF IOWA,
IN AND FOR HENRY COUNTY**

**Cause Nos. CE 804-1184
CE 805-1184**

**IN THE MATTER OF THE RECEIVERSHIP OF
MT. PLEASANT BANK AND TRUST COMPANY,
MT. PLEASANT, IOWA,
RE: GARLAND CARVER, SUCCESSOR TRUSTEE FOR
CITY OF MT. PLEASANT, IOWA,
INDUSTRIAL DEVELOPMENT REVENUE BOND ISSUE
(SAI PROJECT)
and
CITY OF GILMAN, IOWA,
INDUSTRIAL DEVELOPMENT REVENUE BOND ISSUE
(SAI PROJECT),
Plaintiff,
vs.**

**FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver of the Mt. Pleasant Bank and Trust Company;
and CENTERRE BANK NATIONAL ASSOCIATION,
f/k/a FIRST NATIONAL BANK IN ST. LOUIS,
Defendants.**

**FINDINGS OF FACT, CONCLUSIONS OF LAW, &
DIRECTIONS AS TO FURTHER PROCEEDINGS**

(Filed: February 2, 1989)

This is an action on behalf of the bondholders of two industrial development revenue bond issues against the former Mt. Pleasant Bank and Trust Company and Centerre Bank National Association (Centerre), formerly known as First National Bank in St. Louis. The Federal Deposit Insurance Corporation (FDIC) is a party defendant as it became the receiver of the Mt. Pleasant Bank and Trust Company upon its insolvency.

These actions were commenced on November 21, 1984, against FDIC only and by subsequent amendments claims were also made against Centerre. The actions were consolidated for trial and they seek damages, restitution and accounting based upon a breach of fiduciary duty and fraud by the Mt. Pleasant Bank in its capacity as the trustees for the bondholders and a participation in the alleged breach and fraud by Centerre.

These matters came before the Court for trial commencing October 25, 1988, at 9:00 a.m. Appearing for Plaintiff were Jon P. Sullivan and Mark E. Schantz; appearing for Defendant Federal Deposit Insurance Corporation were Michael Noyes and Patrick J. Flynn; appearing for Defendant Centerre Bank National Association, f/k/a First National Bank in St. Louis, were Randall G. Horstmann and Frank L. Burnette II. Trial concluded on October 27, 1988, following which all parties were given until November 30, 1988, to simultaneously file their Proposed Findings of Fact and Conclusions of Law. In addition, the Court also instructed that the record remain open for ten days following trial to allow the parties to designate portions of deposition transcripts which they wished to Court to consider, in lieu of reading such testimony into the record and since three witnesses were not available for trial. Plaintiff's designation was filed on or about November 4, 1988, and Centerre's was filed November 7, 1988. The matter was then orally argued on December 16, 1988, and with the record completed, the Court now enters the following:

FINDINGS OF FACT

SAI Corporation was an Iowa corporation with its main office located in Mt. Pleasant, Iowa. It owned three subsidiaries, known as Scientific Applications, Holland Plastics and Icon Industries, each of which were engaged in the manufacture of a different type of building insulation material. The Holland Plastics plant, located in Gilman, Iowa, produced expanded polystyrene insulation. Scientific Applications and Icon Industries facilities produced, respectively, urea formaldehyde

foam and cellulose insulation and were both located in Mt. Pleasant, Iowa. The president of SAI, and chief decision-maker for each of the subsidiaries, was J.D. Schimmelpfennig.

SAI financed its acquisition of the Holland Plastics facility, as well as the construction of the Icon facility, with the proceeds of the two industrial development revenue bond issues which are the subject of this action. The City of Mt. Pleasant, Iowa, issued \$1,000,000 in bonds as of September 1, 1977, the proceeds of which were loaned to SAI in order to enable it to construct the Icon facility. The City of Gilman, Iowa, issued \$1,100,000 in bonds as of November 1, 1977, the proceeds of which were loaned at SAI in order to enable it to purchase an existing facility in Gilman that manufactured expanded polystyrene insulation (the Holland Plastics facility). The bond loans were to be repaid over a period of fifteen years, in semiannual installments, payable in the spring and fall of each year. Repayment of the Mt. Pleasant and Gilman bond loans was secured, respectively, by the facilities which each bond issue was used to fund.

The Mt. Pleasant Bank and Trust Company executed nearly identical Indentures of Trust with the cities of Mt. Pleasant and Gilman, under which it agreed to act as Trustee for the bond loans by Gilman and Mt. Pleasant to SAI and its subsidiaries. As Indenture Trustee, Mt. Pleasant Bank and Trust Company was assigned and accepted the rights of both cities to enforce the terms of each bond loan against the borrowers, SAI Corporation and its subsidiaries (hereinafter "SAI" and "Scientific," "Holland" and "Icon" or "the subsidiaries.")

The important documents concerning each bond issue include the Loan Agreement between the respective city and SAI Corporation, the Indentures of Trust between the respective city and the Bank, a prospectus to the bondholders, insurance policy on J.D. Schimmelpfennig, and the mortgage and security agreements which gave the bondholders rights to certain real estate and equipment to secure the obligations of the bondhold-

ers under the respective bond issues. (As the closing documents are similar with respect to each bond issue, the Court will not differentiate as to the particular documents for each issue; as the Court refers to the Indenture of Trust or Loan Agreement, it is intended that it refer to either of the issues.)

The duties and responsibilities of the Bank, as Trustee, are set forth in Article X of the Indenture of Trust. Section 10.01(a) defines those duties as follows:

Trustee, prior to the occurrence of an event of default and after curing of all events of default which may have occurred, undertakes to perform such duties and only such duties as are specifically set forth in this indenture. In case an event of default has occurred (which has not been cured or waived) Trustee shall exercise such of the rights and powers vested in it by this indenture, and use the same degree of care and skill in such exercise, as an *ordinary prudent Trustee would exercise or use under a corporate mortgage*. (Emphasis supplied.)

Additional provisions which are relevant to the issues in this matter include Section 10.01(c) of the Indenture which states in part:

Trustee shall not be responsible for any recital by issuer herein or any recital in the bonds . . . or for the sufficiency of the security for the bonds issued hereunder or intended to be secured hereby or for the value or title of the project

. . .

Section 10.01(f) allows the Trustee to rely on any certificate signed by a company representative as sufficient evidence of the facts contained in such a certificate prior to the occurrence of a default.

Article IX, Section 9.01, of the Indenture defines events of default, in part, as follows:

- a. Default in the due and punctual payment of interest of any bond.
- b. Default in the due and punctual payment of the principal of, or premium, if any, on any bond, whether at the stated maturity thereof or upon proceedings of for redemption thereof, or upon the majority thereof by declaration.
- c. Default in the performance or observance of any other of the covenants, agreements or conditions on the part of the Issuer in this Indenture or in the bonds contained and failure to remedy the same after notice thereof pursuant to Section 9.13 hereof.
- d. The occurrence of an event of default under Section 9.1 of the Agreement (loan agreement between the respective cities and SAI Corporation).

Events of default under Article IX, Section 9.1, of the Loan Agreement included the failure by SAI to timely pay the payments required or to observe and perform any covenant, condition or agreement on its part to be observed or performed. Under Article V of the Loan Agreement, such additional covenants of SAI include the payment of interest and principal on the bonds, maintenance of the projects, payment of taxes, and insuring the projects.

Section 9.02 of Article IX of the Indenture of Trust allowed, but does not require, the Trustee to declare the principal and interest immediately due and payable upon the occurrence of an event of default. Also, the holders of not less than 35 percent in aggregate principal amount of the bonds could direct the Trustee to accelerate. Section 9.03 then allowed, but did not require the Trustee to foreclose the mortgage and security instruments with regard to the projects. Again, the holder of not less than 35 percent in aggregate principal amount of the bonds could also direct the Trustee to foreclose. Notice concerning an

event of default was required to be given by the Trustee to each known bondholder. Under Section 9.01, Article X, of the Indenture of Trust known bondholders would be only those people who had requested a registration of the bonds under Section 2.08 of Article II of the Indenture.

The loan agreements placed a limit on the amount of other long-term debt that SAI was permitted to incur while the obligations to the bondholders were outstanding. Generally speaking, with certain exceptions, SAI was not permitted to incur any long-term debt which would cause total long-term debt of SAI to be in excess of two times the consolidated net worth of SAI as of June 30, 1987.

From and after 1977, Mt. Pleasant Bank and Trust Company also made loans to SAI Corporation. The Bank, however, had a legal lending limit of approximately \$225,000 to any one borrower and, therefore, Centerre Bank would participate in loans in excess of the Mt. Pleasant Bank's lending limits.

However, on March 14, 1978, SAI and its subsidiaries executed a loan agreement with Centerre and the Mt. Pleasant Bank which jointly designated both Centerre and the Mt. Pleasant Bank as "lenders." Pursuant to the terms of the "bank" loan agreement, Centerre and the Mt. Pleasant Bank advanced SAI a \$1,000,000 term loan, as well as a \$1,500,000 credit loan. The term loan was payable quarterly and was amortized over a five-year period. The credit loan was payable on demand, but no later than September 30, 1978. The term loan and credit loan were secured by SAI's trade accounts receivables, inventory, equipment, furniture, fixtures and machinery, as well as SAI's real estate other than that securing the bond loans, plus a personal guarantee by J.D. Schimmelpfennig. It does not appear that these loans violated any of the terms of the loan agreement and the Trust Indenture.

Prior to the execution of the March 14, 1978, loan agreement, Centerre's counsel was provided at Centerre's request with all

documentation regarding the two bond issues in question, including the obligations of SAI, the rights of the bondholders, and the obligations of the Mt. Pleasant Bank, as trustee, under the bond documents. This was furnished on January 12, 1978. Centerre prepared all documentation executed in connection with the bank loan agreement, including all subsequent modifications.

Also, all funds advanced by Centerre pursuant to these loan agreements were on a "last in, first out" basis, meaning that unless an actual event of default was declared, Centerre would be entitled to all payments made by SAI and its subsidiaries, from liquidation of collateral or otherwise, until paid in full on both loans, at which time Mt. Pleasant Bank would receive payment on the \$225,000 it advanced.

Thus, in March, 1978, SAI and its subsidiaries owed an obligation with respect to the bond issues in the sum of \$2,100,000 and owed Centerre Bank and Mt. Pleasant Bank the sum of \$1,000,000 on a term loan and an additional sum of \$1,500,000 credit loan due on demand but not later than September 30, 1978. Both banks were aware of these obligations but the bondholders were not.

When the \$1,500,000 credit loan made by the Mt. Pleasant Bank and Centerre to SAI came due on September 30, 1978, it was renewed by the execution of another "credit" note. As in the case of the original credit note, the renewal note was payable "on demand" and no later than one year after its execution — i.e., September 30, 1979.

In 1979 J.D. Schimmelpfennig, through SAI Corporation, decided to acquire an Atlanta, Georgia, insulation manufacturer known as Southeastern Foam Products with eleven manufacturing facilities. SAI Corporation asked Centerre to finance the acquisition; but due to the restrictions in each bond issue on incurring additional long-term debt referred to above, SAI Corporation could not make the purchase. Centerre knew this fact.

Mr. Schimmelpfennig proceeded to acquire Southeastern Foam Products in his name by agreeing to pay \$2,000,000 for the company. SAI Corporation loaned Schimmelpfennig \$475,000 towards the down payment. In return, SAI Corporation was granted an option to purchase the stock from Schimmelpfennig. The stock was to be held in escrow pending completion of the payment for the stock over a seven-year period.

During its fiscal year ending June 30, 1979, SAI suffered some serious setbacks in its operations due in part to adverse publicity regarding urea formaldehyde foam, one of its major products. In its consolidated financial statement for that period, SAI disclosed pre-tax losses of \$1,756,960, after-tax losses of \$929,260, and a loss in working capital of \$1,875,597. At the time of its 1978-79 fiscal year end, however, SAI remained current in its principal and interest payments on all its obligations.

The losses suffered by SAI in its fiscal year ending June 30, 1979, placed SAI in breach of various financial covenants contained in its loan agreements with the banks. The Mt. Pleasant Bank and Centerre waived those defaults by letter agreement and, therefore, the breach was not noted in SAI's annual audit.

When the \$1,500,000 credit loan made by the Mt. Pleasant Bank and Centerre to SAI again came due on September 30, 1979, it was renewed by the execution of another "credit" note. As in the case of the original credit note, the renewal note was payable "on demand," and no later than one year after its execution date — i.e., September 30, 1980. However, the amount of the credit note was reduced to \$1,000,000.

During late 1979 or early 1980, it became apparent to Centerre through one of its loan officers, Howard Manning, that SAI Corporation and its subsidiaries were in trouble. Centerre began exploring obtaining additional security for its existing loans, became more actively involved in supervising and directing the loans, and determined that the credit to these companies should be restricted.

As a result, Centerre notified both SAI and the Mt. Pleasant Bank on July 30, 1980, that Mt. Pleasant and Centerre's bank credit loan to SAI would not be renewed when it came due on September 30, 1980, and that the balance of Mt. Pleasant and Centerre's term loan to SAI would also be due at that time. Manning initially communicated that decision by phone but later confirmed it by letter. The decision was apparently based on SAI's continued losses and deteriorating financial condition. The bank loans were called notwithstanding that SAI had not yet missed any payments of principal or interest on those loans.

Because SAI recognized that the Mt. Pleasant Bank and Centerre were in a position to literally close SAI down by notifying SAI's account receivables to make payment directly to the banks, SAI did all that it could to induce the banks' forbearance from doing so, including a liquidation of certain of its assets and an acceleration of its payments on the bank loans. The assets liquidated by SAI to make such payments included assets in which the banks held no perfected security interest. For example, \$100,000 to \$150,000 in proceeds from the sale of rolling stock — i.e., approximately two dozen vehicles — was paid to the banks from late 1980 through 1981, notwithstanding that neither bank had a lien noted on the certificates of the title to those vehicles.

The banks, with Centerre taking the lead, obtained from SAI Corporation a security interest in all of its general intangibles including, but not limited to, income tax refunds. This was done in January, 1981, and SAI Corporation did not receive anything in return. Rather, this collateral was additional security for the existing loans.

The decision to "call" SAI's bank loans also, inevitably, had an immediate impact on the bondholders. To the extent SAI was handicapped by the loss of its sole source of credit for its daily operations, SAI was also handicapped in its ability to generate revenue from which it could make the payments required by the bond loan agreements. Likewise, SAI's accelera-

tion of its payments to the banks forced SAI to cut back on payments required under the bond loan agreement. Although SAI was able to make the bond payments of principal and interest that came due in the fall of 1980, it failed to pay approximately \$14,000 in September real estate taxes on the real estate securing the Mt. Pleasant bond loan, thereby violating the mortgage securing the Mt. Pleasant bank loan. Subsequent to September of 1980, no further real estate tax payments were made by SAI with respect to either of the properties securing the bond loans.

Also, as previously found, SAI Corporation had loaned Mr. Schimmelpfennig \$475,000 towards the down payment for the purchase of Southeastern Foam Products. In exchange, SAI received 3,060 shares of Southeastern Foam stock. In June, 1981, these shares were pledged by SAI to Centerre and the Mt. Pleasant Bank as further security on the outstanding loans of SAI to the two banks.

In September, 1981, SAI Corporation was late in providing the bank sufficient monies to pay the principal and interest due the Mt. Pleasant issue bondholders on September 1, 1981. The bank made a personal loan to J.D. Schimmelpfennig and Dale Longwell through a partnership known as JS and DL Partnership. That partnership then provided the funds which SAI furnished to the bank for payment of principal and interest on the bonds. The loan to the JS and DL Partnership was secured by a mortgage on real estate owned by that partnership. The loan was immediately purchased by the Exchange Bank of Adair, Iowa. A letter of default was drafted by the Mt. Pleasant Bank but was not sent the Issuers or the bondholders because the payments to the bondholders were made during a grace period allowed under the Loan Agreement.

On November 1, 1981, there was principal and interest payment due from SAI Corporation under the City of Gilman Bond Issue. SAI did not timely make that payment. A Notice

of Default was issued by the bank as Trustee to SAI Corporation, City of Gilman, Iowa, and the registered bondholders. Centerre Bank loaned money to SAI so that the corporation could make the principal and interest payments.

In March and May, 1982, respectively, SAI Corporation did not make interest payments due on the bonds. The Bank, as Trustee, took money from the Special Escrow Fund for each bond issue and, pursuant to Section 5.09 of the Indenture, paid the interest owed on the bonds.

In August, 1982, Mt. Pleasant Bank was closed and the FDIC appointed as its receiver. When SAI failed to make its bond payment in the fall of 1982, the FDIC utilized a special escrow reserve fund, established as a requirement of the bond loans and indenture agreement, to make interest payments only but not of principal. In March, 1983, Centerre mailed notices to SAI's account debtors instructing them to make payment directly to Centerre. Once this action was taken, SAI filed a Chapter 11 bankruptcy proceeding. During the pendency of the bankruptcy proceeding, Plaintiff herein, Garland Carver, was appointed by the Henry County District Court as Successor Trustee for the bond loans. The collateral securing the Gilman bond loan (the Holland Industries facility) was sold as part of the confirmed Chapter 11 plan voted for by the Plaintiff and the proceeds of \$379,052.88 paid to Garland Carver as successor trustee. The lump sum payment was negotiated by Plaintiff in lieu of SAI's initial offer of \$650,000 payable over ten years at 7½ percent interest. The collateral securing the Mt. Pleasant Bank loan (the Icon facility) was abandoned by SAI in the bankruptcy proceeding, foreclosed by Mr. Carver and purchased at sheriff's sale for a credit of \$600,000 against the judgment obtained on the Mt. Pleasant bond loan. As of the last day of trial, Mr. Carver successfully negotiated the sale of this facility at a price of \$400,000.

RULINGS ON MOTIONS

I. DEFENDANT FDIC'S MOTION TO AMEND ADMISSIONS

At trial Defendant FDIC moved to amend its admission to request Number 34 filed by Plaintiff to clarify the amounts of money received by the Mt. Pleasant Bank from October 1, 1980, through August 6, 1982. By way of amendment, Defendant FDIC asked the Court to consider FDIC Exhibits F-C and F-C(1). The amendment was offered to show that the amounts actually received by the Mt. Pleasant Bank for the period was \$75,123.04; other amounts listed in ther requested admission, although received by the Bank, were applied toward the amounts due Centerre on the line of credit.

Rule 128 of the Iowa Rules of Civil Procedure allows a party to amend an admission when the presentation on the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the Court that withdrawal or amendment will prejudice that party in maintaining that party's action on the merits. Such decision to allow the amendment rests on the discretion of this Court. *Allied Gas and Chemical Co., Inc. v. Federated Mutual Insurance Company*, 365 NW2d 26 (Iowa 1985). The Court finds that the amendment does little more than amplify the admission and should therefore be allowed.

II. PLAINTIFF'S MOTION IN LIMINE

Plaintiff's motion in limine, offered the first day of trial and not served upon Defendant Centerre until that time, is denied. The record indicates that the Plaintiff himself was deposed before Defendant Centerre answered the second amended petition and therefore can claim no surprise with respect to the mitigation of damage issues, if any, raised by Centerre. More importantly, all of the matters which Centerre proposed to and did bring before the Court that may be characterized in some

fashion as pertaining to mitigation of damages also go to rebuttal of the proof of the damage element necessary to Plaintiff's claim in Counts I and III.

III. PLAINTIFF'S MOTION TO AMEND TO CONFORM TO PROOF

Because of the conclusions hereafter made, the Court finds no liability on the part of Defendant FDIC in its corporate capacity. The Court further finds that the FDIC in its corporate capacity cannot be held responsible for damages. See *Batsakis v. FDIC*, 570 F.Supp. 749 (W.D. Mich. 1987).

CONCLUSIONS OF LAW

The Indenture of Trust requires the Mt. Pleasant Bank to use that degree of care and skill as an ordinary, prudent trustee would exercise or use under a corporate mortgage. It specifically provides that the trustee would not be responsible for the sufficiency of the security for the bonds.

Besides the specific requirements of the Indenture, a trustee has certain common law duties of a fiduciary. They include: (a) the duty to administer the trust; (b) the duty of loyalty; (c) the duty to furnish accurate information upon request; (d) the duty to exercise reasonable skill; and (e) the duty to preserve the trust property. *Restatement, Second, of Trusts*, Sections 169 through 176.

It is also fundamental that a trustee who holds a claim against an obligor as trust property, and also personally has a claim against the same obligor, has a duty under the loyalty doctrine not to favor its own interest in making collections of those obligations. *Bogert, The Law of Trust and Trustee*, Section 592 (Rev. 2nd Ed. 1980); *Dabney v. Chase Nat. Bank of City of New York*, 196 F.2d 668, 672-73 (2d Cir. 1952).

The burden of proof in this case is on Plaintiff to establish a violation of a fiduciary duty by the Mt. Pleasant Bank.

At the outset the Court would note that it finds no breach of duties by the Mt. Pleasant Bank from the date it accepted the trust until the summer of 1980. SAI was currently making all payments of interest and principal on the bond issues. Further, the record contains evidence that the applicable life insurance policies on J.D. Schimmelpfennig were in effect. Taxes were current, although the 1979 Marshall County taxes, due in September of 1980, were about to become delinquent. The company had certified to the Bank that it was not in default under any covenant or condition through August 19th of 1980.

However, the evidence does point to increasing problems experienced by SAI in its business operations. The record reflects pressures on the cellulose and urea formaldehyde business integral to the company's operation. Urea formaldehyde was under increasing regulatory scrutiny, which ultimately resulted in banning (for a period) the sale of urea formaldehyde as insulation material. The cellulose operations were, in fact, shut down by SAI; SAI operated its cellulose business through a third party manufacturer. Additionally, the financial statements of the company indicate declining revenues and a declining asset base.

Although the company was in financial difficulty, SAI made principal and interest payments in 1980 and interest payments in the spring of 1981. It was not until the fall of 1981 that the financial difficulties of SAI were serious enough to cause principal and interest payments from being made.

The Bank prepared, but did not send, a Notice of Default in September of 1981 concerning the Mt. Pleasant issue. A personal loan to J.D. Schimmelpfennig and an associate allowed those payments to be made. In November of 1981 a payment was not made timely. The Bank prepared and sent a Notice of Default to the City of Gilman, SAI, and the bondholders known to the Bank at that time.

Although payments were made to the bondholders in the spring of 1982, such payments were made from the special escrow fund. No Notice of Default was sent by the Bank, although required. During that period, the Bank was making some effort to expand its list of bondholders.

Additionally, the Court concludes that several covenants were violated after August, 1980. For example, there is no evidence that the insurance of J.D. Schimmelpfennig was in place; real estate taxes continued to be delinquent; and the Bank had received no further letters of assurance from SAI that it was not in default under the loan agreements.

All of the foregoing constituted events of default as defined in article IX, Section 9.01, of the Trust Indenture and would have permitted the trustee to declare the principal and interest immediately due and payable and foreclose the mortgage on the property.

The Court concludes that the issue of whether the Mt. Pleasant Bank as trustee breached its fiduciary duty must be judged by the events existing after September, 1980. The Mt. Pleasant Bank could have declared a default but did not.

The Court further concludes that Centerre Bank had actual notice of the Mt. Pleasant Bank's duty of loyalty to the bondholders. Howard Manning knew of SAI's bond indebtedness, was aware of the Mt. Pleasant Bank's role as trustee of the bond loans, and knew that the trustee was required to carefully represent the interest of the bondholders in the collection of the bond loans. There is substantial evidence that Centerre had access to, as well as possession of, the bond loan closing books.

Centerre Bank also had constructive notice of the Mt. Pleasant Bank's duty of loyalty to the bondholders. Because Centerre's counsel asked for and received copies of the official statements for both bond loans, Centerre is chargeable with notice of the official statements' contents, including their detailed descriptions of SAI's covenants under the bond loan. *Moser*

v. Thorp Sales Corp., 312 NW2d 831, 888 (Iowa 1981) (a party is considered to have notice of all facts; notice of which can be charged upon its attorney). The official statements defined "events of default" under the bond loan agreement to include "failure to pay any [bond] loan payment when due and "default . . . in the payment of principal or interest on any obligation of the company for borrowed money . . ."

Moreover, because the Mt. Pleasant Bank had the apparent duty under its "participation agreement" with Centerre to report to Centerre any defaults by SAI on its indebtedness to third parties, the law of agency imputes to Centerre the Mt. Pleasant Bank's knowledge of SAI's default under the bond loans. *Restatement, Second, of Agency*, Section 272, 275 (1949). Finally, Centerre's undisputed knowledge of the Mt. Pleasant Bank's role as trustee for the bondholders, coupled with Centerre's knowledge of SAI's default on the bank loans and its overall financial difficulties (including SAI's massive losses, its closing of the cellulose plant, and its need to borrow in the fall of 1981 to make its bond payments), was sufficient to impose a duty on Centerre to inquire into the legality of the actions taken by Centerre and the Mt. Pleasant Bank for the collection of their own loans to SAI, including the calling of the bank loans in September of 1980, and the ensuing liquidation of SAI and the pledge of SAI's remaining unencumbered assets to the banks. *Bogert, The Law of Trusts and Trustees*, Section 901 at 232 (Rev. 2d Ed. 1980); 76 Am.Jur.2d, Trusts, Section 309 (1975).

The events after September, 1980, lead this Court to conclude that the Mt. Pleasant Bank breached its fiduciary duty of loyalty to the bondholders. As stated, Mt. Pleasant Bank, as trustee, could have, at that time, declared a default but did not. This alone would be insufficient to find any liability on the part of the Bank since the trust instrument gives the trustee discretion to waive any event of default except failure to pay principal and interest when due.

However, subsequent actions by the Bank after September, 1980, to "shore up" their security on their loans lead this Court to conclude that the failure to declare a default was motivated by a desire of Mt. Pleasant Bank, with Centerre's urging and assistance, to improve their personal position in the event of insolvency of SAI.

Although the bondholders were secured creditors, if their security proved insufficient to satisfy the outstanding indebtedness, they were still in a position to share in assets not pledged as security in the event of insolvency. Also, had the Bank, as trustee, declared a default on or shortly after September, 1980, there were unencumbered assets which SAI could have liquidated and paid to the bondholders or pledged as further security for the protection of the bondholders.

Instead, unencumbered assets, such as income tax refunds, vehicles, stock of Southeastern Foam which was held in escrow to secure the repayment of the loan made by SAI to Mr. Schimelpfennig for the down payment, and other assets were pledged to the banks after September, 1980, to further secure the indebtedness to the bank that had its genesis in 1978.

Plaintiff urges that a fiduciary who acquires property in violation of a fiduciary duty hold the property in constructive trust for the beneficiaries. In other words, Plaintiff asks, as a remedy, that this Court impose a constructive trust on all property of SAI received by the banks after September of 1980. Plaintiff recognizes that this would penalize the Defendants for "they clearly would have received some portion of that amount in the absence of their wrongful action." The Court concludes that the request for a constructive trust on all amounts collected by the banks after September, 1980, is not an appropriate remedy.

A more appropriate remedy would be to award the bondholders a pro rata share of the proceeds collected by the banks after September 30, 1980, *from assets taken as security after*

September 30, 1980, by the bank. This would place the parties in their relative positions as they existed as of September 30, 1980, before any breach of loyalty occurred as found by this Court.

In order to achieve this result, the Court is ordering that the parties file an accounting setting forth all amounts received by the banks from assets taken as security after September 30, 1980. Upon receipt of this accounting, the Court will then fix damages pro rata entertaining any suggestions by the parties in supplemental written briefs. The accounting shall be filed within thirty (30) days from the date this ruling is filed with the Henry County Clerk.** (1)

DATED this 1st day of February, 1989.

/s/ David B. Hendrickson
Judge, Eighth Judicial District of
Iowa

Copies To: Counsel of Record

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** (1) The Court is aware that, in all likelihood, the information sought in this order for accounting exists in the many exhibits introduced at trial. However, I believe the parties are in a better position to glean this information from the documents and, therefore, for the sake of accuracy, I am asking the parties to assist the Court.

APPENDIX E

**IN THE DISTRICT COURT OF IOWA
IN AND FOR HENRY COUNTY**

Cause Nos. CE 804-1184
CE 805-1184

In the Matter of the Receivership of Mt. Pleasant Bank
and Trust Company, Mt. Pleasant, Iowa,

Re: Garland Carver, Successor Trustee for City of
Mt. Pleasant, Iowa, Industrial Development Revenue
Bond Issue (SAI Project) and City of Gilman, Iowa,
Industrial Development Revenue Bond Issue (SAI Project),
Plaintiff,

vs.

Federal Deposit Insurance Corporation, as Receiver
of the Mt. Pleasant Bank and Trust Company; and
Centerre Bank National Association, f/k/a First
National Bank in St. Louis,
Defendants.

**SUPPLEMENT TO THE COURT'S FINDINGS OF
FACT, CONCLUSIONS OF LAW and JUDGMENT**

By a prior ruling of the Court, the parties were ordered to file an accounting of proceeds received by the Mt. Pleasant Bank and Trust Company and Centerre Bank National Association, f/k/a First National Bank in St. Louis, from assets which the banks took as security after September 30, 1980.

The banks and FDIC have filed documents in response to the Court's request. Perhaps to clarify the Court's prior order before proceeding further, it is appropriate to point out that it was the intent of the Court that the request was limited to additional assets pledged by SAI to the banks after September 30, 1980, as security for loans that were already in existence on or

before September 30, 1980. It was and is the Court's belief that taking additional security on pre-existing loans after the banks knew or should have known that Mt. Pleasant Bank and Trust Company should have declared a default on the obligations to the bondholders was an attempt by the banks to improve their collateral position at the expense of the bondholders. The Court has previously found that September 30, 1980, was the appropriate date to gauge the knowledge of the banks.

The request for additional information was an attempt by the Court to determine the sums received by the banks from collateral pledged after September 30, 1980. The Court then expressed its intent to treat those sums as unencumbered assets in which the parties would share pro rata. In other words, the Court concluded that the parties should be returned to their respective positions as of September 30, 1980.

The evidence is clear that the banks took security in the following items after September 30, 1980:

"All general intangibles now owned or hereinafter acquired including, but not limited to, income tax refunds, good will, license rights, manufacturing rights, patents, copyrights, trademarks, trade names, service marks, engineering drawings, blueprints, technical data, specification sheets, catalogs, customer lists, books and records, bids, proposals and cost estimates." [See Plaintiff's Exhibit 14.]

The evidence is also clear that the banks received an assignment of the proceeds from the sale of 3,060 shares of Southeastern Foam Products, Inc., stock on May 16, 1981. The assignment was obtained subsequent to September 30, 1980. [See Plaintiff's Exhibit 42.] The stock was sold for \$200,000 payable by a down payment of \$100,000 and two annual payments of \$50,000 each. [See Plaintiff's Exhibit 96.]

Aside from these two items, the parties have not pointed out, nor has the Court been able to discover, any other assets in

which the banks took a security interest after September 30, 1980. There were assets sold after September 30 and the proceeds applied to the indebtedness to the banks. For example, vehicles, office equipment and tools were sold on or about June 8, 1982, and the proceeds of \$32,595.30 were applied to the banks' debt. [Plaintiff's Exhibit 68] However, from the evidence presented, the Court is unable to conclude if the items sold, exclusive of vehicles, were items pledged to secure the bondholders' indebtedness or items pledged to secure the banks' indebtedness. The bondholders did have a security interest in certain enumerated office equipment but not vehicles, and the banks had a security interest in personal property, excluding vehicles, not pledged as security for the bondholders or a second lien on items pledged to the bondholders. The security interests were taken prior to September 30, 1980. (1)

With respect to the security interest taken in general intangibles including income tax refunds, the only evidence in the record fixing a value to any of these items is with respect to income tax refunds. There is a dispute with respect to the size of the income tax refund, but the Court concludes there is sufficient evidence in the record to demonstrate that Centerre Bank received at least \$80,000 as of March 25, 1982, representing an income tax refund assigned pursuant to Plaintiff's Exhibit 14.

With respect to the proceeds received from the sale of 3,060 shares of Southeastern Foam Products, Inc., stock which was assigned to the predecessor of Centerre Bank on May 16, 1981, the Court is satisfied that the evidence supports a conclusion Centerre Bank received at least \$200,000 from the sale of the stock.

(1) In the Findings of Fact, the Court made a finding that the banks received \$100,000 to \$150,000 in proceeds from the sale of "rolling stock." The Court believes other than the testimony of one witness making reference to this fact, there is insufficient evidence to support this finding and the same is no longer considered as a finding.

Accordingly, the Court fixes the amount of proceeds in which the banks took a security interest after September 30, 1980, at \$280,000.

Having concluded that the sum of \$280,000 should be shared pro rata in accordance with the previous Findings of Fact and Conclusions of Law, the next step is to determine the pro rata share of the bondholders and the banks.

The balances owed on the principal resulting from the Gilman bond issue as of September 30, 1980, was \$1,005,00 and on the Mt. Pleasant bond issue the balance was \$870,000. The balance owing to the banks after September 30, 1980, according to the consolidated financial report as of June 30, 1980, less a payment of \$50,000 made on July 7, 1980, was \$1,297,000. Therefore, the total debt as of September 30, 1980, is fixed at \$3,172,000 for the purposes of determining pro rata shares. Of the total debt, the banks' proportion would compute out at 41 percent and the bondholders' proportion would be 59 percent.

Applying these percentages to the amount of proceeds in which the banks took a security interest after September 30, 1980, the Court concludes that the bondholders are entitled to \$165,200 and the banks are entitled to \$114,800.

The record is clear that the income tax refund and the proceeds from the sale of the Southeastern Foam Products, Inc., stock were all paid to Centerre Bank National Association. It does not appear that the Mt. Pleasant Bank and Trust Company received any of the proceeds. Therefore, it is the conclusion of this Court that Plaintiff shall have judgment against Centerre Bank National Association, f/k/a First National Bank in St. Louis, in the sum of \$165,200.

Plaintiff's request that the Court award interest on any judgment from the date the banks had use of the funds at the rate of 13.5 percent, which is the rate the banks were charging SAI. The request is based on the assertion the banks had use of the money

and the case of *Charles v. Epperson & Company*, 137 NW2d 605 (Iowa 1965).

The Court concludes there may be some merit to Plaintiff's position but also concludes that Section 535.3 limits interest from the date the action was commenced in the absence of a contract setting another rate of interest. Therefore, this Court concludes that interest on the judgment shall be fixed at the rate of 10 percent per annum from November 21, 1984, the date the petition was filed.

Judgment is entered in favor of Plaintiff and against Centerre Bank National Association, f/k/a First National Bank in St. Louis, in the sum of \$165,200 plus interest at the rate of 10 percent per annum from November 21, 1984.

Court costs are assessed against both Defendants.

DATED this 22nd day of March, 1989.

/s/ David B. Hendrickson
Judge, Eighth Judicial District of
Iowa

Copies To: Counsel of Record

3-23-89

Michael Noyes & Patrick J. Flynn
John Sullivan & Mark Schantz
Frank L. Burnette II & Randall G. Horstmann

APPENDIX F

**IN THE DISTRICT COURT OF IOWA
IN AND FOR HENRY COUNTY**

Cause Nos. CE 804-1184

CE 805-1184

**In the Matter of the Receivership of Mt. Pleasant Bank
and Trust Company, Mt. Pleasant, Iowa,**

**Re: Garland Carver, Successor Trustee for City of
Mt. Pleasant, Iowa, Industrial Development Revenue
Bond Issue (SAI Project) and City of Gilman, Iowa,
Industrial Development Revenue Bond Issue (SAI Project),
Plaintiff,**

vs.

**Federal Deposit Insurance Corporation, as Receiver
of the Mt. Pleasant Bank and Trust Company; and
Centerre Bank National Association, f/k/a First
National Bank in St. Louis,
Defendants.**

RULINGS

Pursuant to R.C.P. 179(b), the parties have filed motions requesting this Court to expand or change its prior rulings on a number of issues. The matters came on for oral argument on April 6, 1989, at Mt. Pleasant, Iowa. After hearing arguments of counsel, the Court makes the following rulings with respect to each motion filed and argued.

**I. Motion of Centerre Bank for Enlargment and Amendment
of Findings and Conclusions filed February 10, 1989.**

Initially it should be noted that a ruling on this motion was delayed until the Court filed its supplement to its original Findings and Conclusions.

In this motion, Centerre takes issue with a number of findings of the Court as well as conclusions drawn from the findings. The Court will endeavor to address each of the matters raised in Centerre's motion.

(a) Centerre takes issue with the Court's statement on page 1 of its ruling which states "the actions were consolidated for trial and they seek damages, restitution and accounting." In fact this is only a partial quote from what the Court stated. The action, as filed, did seek damages, restitution and an accounting based upon a breach of fiduciary duty by the Mt. Pleasant Bank as trustee for the bondholders. An accounting by Centerre is implicit if it knowingly received the benefit of any wrongdoing by the Mt. Pleasant Bank.

Centerre further questions the Court's reference to the term fraud claiming fraud was neither alleged or proven. The Court feels that the allegations contained in the petition concerning fraudulent conveyance includes fraud as an element. The Court agrees that fraud was not proven nor did the Court base its decision on a finding of fraud. Therefore, the Court finds no reason to change its ruling based upon paragraph 1 of Centerre's motion.

(b) Centerre challenges the Court's findings "that Centerre's counsel was provided at Centerre's request with all documentation regarding the two bondholders . . ." Without detailing each and every reference in the record, the Court concludes the evidence, in fact, does support this finding and the request of Centerre is denied as to this paragraph.

(c) Centerre's challenge to the Court's finding that a \$100,000 to \$150,000 was paid to the banks from proceeds of rolling stock, has been amended in the supplement to the Court's findings and conclusions.

(d) Centerre's challenge to the Court's findings that SAI did not receive anything in return for granting the banks a security

interest in general intangibles is overruled. The Court believes that the record adequately supports this finding.

(e) Centerre's challenge to the Court's findings that calling SAI's loans had an immediate impact on its bondholders is overruled. Again, the Court believes the record adequately supports this finding.

(f) Centerre's assertion that Centerre had a security interest in all of SAI's general intangibles since 1978 is contrary to plaintiff's Exhibit 14 and therefore the Court believes the record does support the challenged finding.

The Court has considered all of the challenges made by Centerre to the Conclusions of Law including Centerre's reliance on the case of *Metge v. Baehler*, 762 F.2d 621 (8th Cir. 1985). The Court finds nothing persuasive to lead it to change its Conclusions or to liability. It was and apparently still is Centerre Bank's position that the Mt. Pleasant Bank and Centerre were operating independently of each other while the Court believes the evidence supports a contrary conclusion. The Court has held and believes the evidence supports a finding that all of the actions of Centerre Bank subsequent to September 30, 1980, were done with the knowledge of the fiduciary relationship occupied by Mt. Pleasant Bank. The Court further concludes that failure of Mt. Pleasant Bank to exercise its fiduciary powers to protect the bondholders at a time when everyone but the bondholders knew of the precarious financial condition of SAI was done with the knowledge and insistence of Centerre Bank. The evidence adequately supports a conclusion that when balancing the relative positions of Mt. Pleasant Bank and Centerre Bank in their financing of SAI, Centerre Bank was the dominant force and as a result reaped the benefits of the breach of loyalty owed by the Mt. Pleasant Bank.

The motion filed February 10, 1989, to enlarge and amend the Court's Findings and Conclusions is overruled in all other respects.

II. Supplemental Motion of Centerre Bank for Enlargement and Amendment of Supplement to Court's Findings of Fact, Conclusions of Law and Judgment.

After the Court filed its supplement to the Findings of Fact and Conclusions of Law fixing damages, Centerre filed this motion for enlargement and expansion of the Court's Findings and Conclusions as to damages.

1. Centerre disputes the findings that it received at least \$80,000 as of March 25, 1982, representing an income tax refund. The Court is satisfied there is sufficient direct as well as circumstantial evidence to support a conclusion that Centerre Bank received at least \$80,000 from tax refunds in which it did not have a security interest until after September 30, 1980. Therefore, with respect to this assertion Centerre's motion is overruled.

2. Centerre Bank also disputes the Court's conclusions that it received \$200,000 from the sale of Southeastern Foam Products, Inc., stock in which Centerre took a security interest after September 30, 1980. The Court acknowledges there is a question of whether the \$200,000 owed by Southeastern Foam Products, Inc., to SAI was for monies advanced or paid by SAI on behalf of Southeastern Foam, Inc., or for the sale of stock or both. Nevertheless, payments received were paid to Centerre and the Court concludes that Centerre's right to these payments did not exist prior to September 30, 1980.

With respect to the amount received, the Court does find upon further review of the record that Centerre actually received \$100,000 at the time of closing around October 15, 1981, and eleven monthly payments of \$5,000 each for a total of \$155,000 as reflected in Ted Roth's testimony and the documents attached to Centerre's accounting filed March 1, 1989.

The trustee, Garland Carver, asserts that Centerre received an additional \$61,000 as a result of a settlement reached between

SAI Corporation and the Bankruptcy Trustee of Southeastern Foam Products, Inc. This fact is found in a footnote to the First Amended and Fully Substituted Plan of Reorganization filed in the United States Bankruptcy Court, Southern District of Iowa.

The Court is unable to make this conclusion from the documentation supplied since the footnote only refers to the fact the settlement proposed was submitted to the United States Bankruptcy Courts in Iowa and Georgia for approval. The Court does not know if in fact it was approved or the reason for the proposed settlement. Therefore, the Court concludes that the supplement to its Findings of Fact and Conclusions of Law should be amended to reflect that Centerre Bank received at least \$155,000 not \$200,000 from this transaction.

The other issues raised by Centerre about interest and assessing liability against Mt. Pleasant Bank also have all been raised by Garland Carver as trustee and will be addressed hereafter.

III. Motion by Plaintiff, Garland Carver, for Enlargement and Amendment of Findings and Conclusions.

Plaintiff, Garland Carver, has requested the Court to amend its findings and conclusions and the Court makes the following ruling as to each request.

1. Plaintiff asserts that the record supports a finding that Centerre Bank received not less than \$100,000 in proceeds from the sale of rolling stock owned by SAI or one of its wholly owned subsidiaries subsequent to September 30, 1980. Plaintiff claims that the banks did not have a perfected security interest in this rolling stock.

Initially, the Court found this to be a fact. However, upon re-examination of the record when attempting to place a dollar amount on what was received by the banks, the Court concluded there was insufficient evidence to ascertain what amounts the banks received. It should be noted here that plaintiff asserts

that the burden of proof on this question should be on the defendants, but the Court has not done so nor does it choose to do so because, although the Court found a breach of a duty of loyalty to the bondholders, it did not find fraud was established which requires clear and convincing evidence.

The record on the amount the banks allegedly received from the sale of the so-called rolling stock which the Court believes means sale of vehicles, trucks, tractors and trailers consists of the testimony of Schimmelpfennig who estimated that the banks received \$100,000 to \$150,000 from the sale of these items. R. J. Bontrager, former president of the Mt. Pleasant Bank, acknowledged that SAI began selling "probably two dozen vehicles, you know, the tractor/trailer units, the big cylinder type units . . . sometime in 1980 maybe late '80 and 1981." He further acknowledged that these units had a security interest on them from another bank which was first satisfied before any proceeds were paid to the defendants. He was asked, "Do you have any idea what the total proceeds from those assets were?" He replied that he did not.

The Court is simply unable to ascertain from any of the evidence what amounts the defendants received from these assets and for that reason the Court is satisfied plaintiff has not carried its burden in proving this item of alleged damage.

The second contention of plaintiff in his request to the Court to amend its conclusions concerns its refusal to allow pre-petition interest from the date subsequent to September 30, 1980, on proceeds received by the banks. Plaintiff relies on the recent case of *American Trust & Savings Bank v. United States Fidelity Guaranty Company*, 418 N.W.2d 853 (Iowa 1988). The Court held that interest may be awarded from the date of each embezzlement until the date an action is commenced. In other words the Court has permitted pre-petition interest on with respect to stolen funds. Interest owing on embezzled funds is set at 5% by Iowa Code Section 532.2 according to the Court in the case of *Mechanicsville T&S Bank v. Hawkeye Security Ins. Co.*, 158 N.W.2d 89, 93 (Iowa 1968).

This Court now believes that plaintiffs' argument is well taken. The defendants in this case have had the use of money which this Court has found they did not have any more right to it than the bondholders and the bondholders were denied their right to these funds because of a breach of loyalty by the trustee bank.

Finally both the plaintiff and the Defendant Centerre Bank requests the Court to enter judgment against both defendants because their liability is joint and several. The Court finds merit to this request also.

The Court believes it has addressed the issues raised by the parties in their motions pursuant to R.C.P. 179(b) and the judgment is accordingly modified as follows:

1. The Court fixes the amount of proceeds in which the banks took a security interest after September 30, 1980, and received said sums at \$235,000 instead of \$280,000 as originally stated.

2. Using the same ratio as previously stated, plaintiffs are entitled to a judgment in the sum of \$138,650 (59% of \$245,000).

3. Plaintiffs are entitled to interest on their judgment as follows:

- a) With respect to the income tax refund of \$80,000 interest at the rate of 5% per annum shall be allowed from March 25, 1982, until August 19, 1986, against Centerre Bank. Interest at the rate of 10% per annum shall be assessed against Centerre Bank from August 19, 1986, until paid. Interest at the rate of 5% per annum shall be assessed against the Federal Mt. Pleasant Bank and Trust Company on the theory of joint and severable liability from March 25, 1982, until November 21, 1984, and thereafter at the rate of 10% per annum.

- b) With respect to the funds received by virtue of the resale of Southeastern Foam Products, Inc., interest at the rate of 5% per annum shall occur from the dates payments totalling

\$155,000 were received by the bank until August 19, 1986, against Centerre Bank and thereafter interest at the rate of 10% per annum.

Interest at the rate of 5% per annum shall likewise be assessed against Mt. Pleasant Bank to November 21, 1984, and thereafter at the rate of 10%.

Nothing herein shall be construed to permit plaintiff to recover duplicate interest from the defendants, but rather on the theory of joint and severable liability, the Court is attempting to fix interest liability with regard to the dates the actions were filed against the parties.

4. The Judgment of the Court is further amended to provide that Judgment is entered against both defendants and the costs are likewise assessed against both defendants.

Dated and signed this 20th day of April, 1989.

/s/ David B. Hendrickson
Judge, Eighth Judicial District of
Iowa

Copies to: Counsel of Record

Jon P. Sullivan and Mark E. Schantz
Frank L. Burnette II and Randall G. Horstmann
Michael Noyes and Patrick J. Flynn

APPENDIX G

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF IOWA**

**Case No. 83-336-C
Chapter 11**

**IN RE:
SAI CORPORATION,
Debtor.**

**FIRST AMENDED AND FULLY SUBSTITUTED
PLAN OF REORGANIZATION**

(Filed: March 4, 1986)

COMES NOW, the Debtor, and pursuant to Section 1121(c) of the Bankruptcy Code, proposes the following Plan of Reorganization as a First Amended and Fully Substituted Plan of Reorganization to that filed December 16, 1985:

ARTICLE I

DEFINITIONS

For purposes of this Plan of Reorganization, the following terms shall have the respective meanings hereinafter set forth (such meanings to be equally applicable to the singular and plural forms of the terms defined):

1.01 *Administrative Claim* means any cost or expense of administration of the Chapter 11 case entitled to priority in accordance with the provisions of Section 503(b) and 507(a)(1) of the Bankruptcy Code *including*, without limitation, any actual or necessary expenses of preserving the Debtor's estate and operating the Debtor's business, all compensation or reimbursement of expenses to the extent allowed by the Court under Section 330 or 503 of the Bankruptcy Code, and any fees or charges assessed against the Debtor's estate under Chapter 123 of Title 28, United States Code.

1.02 *Allowed Claim* means any claim against the Debtor, proof of which was timely and properly filed in accordance with order of Court dated February 28, 1984, and to which no objection to the allowance thereof has been interposed on or before the confirmation date or such other applicable period of limitation fixed by the Bankruptcy Code, the Bankruptcy Rules or the Court, or as to which any objection has been determined by final order to the extent such objection is determined in favor of a claimant. Unless otherwise specified herein or by order of the Court, "allowed claim" should not include interest on such claim for the period from and after March 7, 1983, the date on which the Debtor filed a Petition for relief commencing the Chapter 11 case.

1.03 *Allowed Priority Claim* means that portion of an allowed claim entitled to priority under Section 507(a)(3) of the Bankruptcy Code.

1.04 *Allowed Secured Claim* means an allowed claim secured by a lien, security interest or other charge against or interest in property in which the Debtor has an interest, or which is subject to setoff under Section 553 of the Bankruptcy Code, to the extent of the value (determined in accordance with Section 506(a) of the Bankruptcy Code) of the interest of the holder in such Allowed Claim in the Debtor's interest in such property or to the extent of the amount subject to such setoff, as the case may be.

1.05 *Bankruptcy Code* means the Bankruptcy Reform Act of 1978, as amended, and as set forth in Section 101 et seq. of Title 11, United States Code.

1.06 *Bankruptcy Rule* means the Rules of Procedure in bankruptcy cases applicable to cases pending before the Court, as amended.

1.07 *Cash* means cash and cash equivalents.

1.08 *SAI Corporation*, means SAI Corporation, the Debtor and the Debtor-in-possession in the Chapter 11 proceeding, Case No. 83-336-C.

1.09 *Chapter 11 Case* means the Chapter 11 case commenced by the Debtor on March 7, 1983.

1.10 *Claim* means a claim against the Debtor, as defined in Section 101(4) of the Bankruptcy Code.

1.11 *Class* means any class into which allowed claims and allowed interest are classified pursuant to Article III of this Plan.

1.12 *Confirmation Date* shall mean the date upon which the Order of Confirmation is entered by the Court.

1.13 *Order of Confirmation* shall mean the order entered by the Court confirming the Plan in accordance with the provisions of Chapter 11 of the Code, which order is no longer subject to appeal or certiorari proceeding and as to which no appeal or certiorari proceeding is pending.

1.14 *Court* shall mean the United States Bankruptcy Court for the Southern District of Iowa, Central Division, in which the Debtor's Chapter 11 case, pursuant to which the Plan is proposed, is pending and any court having competent jurisdiction to hear appeals or certiorari proceedings therefrom.

1.15 *Debtor* shall mean SAI Corporation, the Debtor and Debtor-in-possession in the Chapter 11 proceeding, Case No. 83-336-C pending in the Court.

1.16 *Lien* shall mean a mortgage, pledge, judgment lien, security interest, charging order, or other charge or encumbrance on the Debtors' property effective under applicable law and which shall not be subject to being set aside or avoided under applicable Bankruptcy Law.

1.17 *Effective Date of the Plan* means the date, as soon as practical, but no event later than ten days after the date on which the confirmation order shall become a final order.

1.18 *Final Order* means an order or a judgment which has not been reversed, stayed, modified, or amended and as to which the time to appeal or seek review or rehearing has expired and to which no appeal or petition for review or rehearing is pending, as a result of which order shall have become final in accordance with applicable law.

1.19 *Plan* shall mean this Chapter 11 First Amended And Fully Substituted Plan of Reorganization, as amended or modified in accordance with terms hereof or in accordance with the Bankruptcy Code.

1.20 *Contested Claim* means any claim as to which the Debtor or other party in interest, including the Creditors' Committee, has interposed an objection in accordance with the Plan, the Bankruptcy Code, and the Bankruptcy Rules, which objection has not been withdrawn or determined by a final order.

1.21 *Pro rata* shall mean proportionately, so that the ratio of the amount of cash, distributed on account of an allowed claim to the allowed amount of the claim is the same as the ratio of the amount of cash as may be distributed on account of all claims of the Class in which the particular claim is included to the amount of all allowed claims of that Class.

1.22 *Contested Claim Fund* shall have the meaning specified therefore in Section IV of this Plan.

1.23 *Iowa Business Growth Financing Agreement* shall mean a loan in the amount of \$400,000.00 obtained through Iowa Business Growth secured by post-confirmation assets of the Debtor except for those items in which various secured claimants shall maintain their lien pursuant to the terms of the Plan and all documents to be executed by the Debtor thereto to consummate the Financing Agreement.

ARTICLE II

MEANS FOR IMPLEMENTATION OF THE PLAN

2.01 The funds necessary for the satisfaction of creditors' claims shall come from the Iowa Business Growth Financing Agreement and from the lease of the Debtor's real estate and machinery and equipment retained under the Plan to Holland Plastics, Inc.

ARTICLE III

CLASSIFICATION OF CLAIMS AND INTEREST

3.01 *General Classification Rule.* The claim is a particular Class only to the extent that the claim qualified within the description of that Class and is in a different Class to the extent the remainder of the claim qualified within the description of the different Class.

3.20 *Classification.* All allowed claims and all allowed interest shall be divided into the following classes, which classes shall be mutually exclusive:

a. *Class 1 Claim* shall consist of the allowed secured claims of Centerre Bank National Association and Federal Deposit Insurance Corporation by virtue of a pre-bankruptcy lien on the Debtor's equipment, inventory, accounts receivable, certain real property, as well as a post-bankruptcy lien on the Debtor's inventory, equipment, accounts receivable and cash pursuant to Order of Court entered August 1, 1983.

b. *Class 2 Claim* shall consist of the secured claim of Garland Carver, Successor-Trustee to Mt. Pleasant Bank and Trust Company for Mt. Pleasant, Iowa, Industrial Revenue Bond Issues by virtue of a lien on the Debtor's equipment and a mortgage on real estate situated in Mt. Pleasant, Iowa.

c. *Class 3 Claim* shall consist of the secured claim of Garland Carver, Successor-Trustee to Mt. Pleasant Bank and Trust Company for City of Gilman Industrial Revenue Bond Issues secured by virtue of a lien on the Debtor's equipment and a mortgage on Debtor's real property situated in Gilman, Iowa.

d. *Class 4 Claim* shall consist of the secured claim of the Lelia Kennedy Trust as contract seller of a tract of land located in Henry County, Iowa.

e. *Class 5 Claim* shall consist of all administrative claims arising under Section 507(a)(1) and 503(b)(1)(A) of the Bankruptcy Code.

f. *Class 6 Claim* shall consist of all unsecured claims having priority by reason of the provisions of 11 U.S.C. Section 507 other than those in Class 5.

g. *Class 7 Claim* shall consist of the unsecured claim of Southeastern Foam Products, Inc.

h. *Class 8 Claim* shall consist of the unsecured claims of Holland Plastics, Inc., and Scientific Applications, Inc.

i. *Class 9 Claim* shall consist of all allowed unsecured claims.

j. *Class 10 Claim* shall consist of allowed interest.

ARTICLE IV

PROVISIONS FOR THE PAYMENT OF CLAIMS

4.01 *Class 1 Claim.* (Secured claims of Centerre Bank National Association and Federal Deposit Insurance Corporation with a principal balance of approximately \$867,808.18 (secured and unsecured portions by virtue of claim Nos. 32 and 71 respectfully) secured by virtue of a lien on the Debtor's equipment, inventory, accounts receivable and real property legally

described in Exhibit "A" and "B" which are attached hereto and made a part hereof by reference. The secured claim in Class 1 shall be settled and satisfied by payment to the holders of such claims, their proportionate share of the net proceeds from the sale of personalty (excluding stock) in which the Class 1 claimants have a first lien no later than one year after the effective date of the Plan. The Debtor shall also assign any claim it may have against the Southeastern Foam Products, Inc. to the Class 1 claimants. The Class 1 claimants shall retain their lien on the property of the Debtor legally described in Exhibit "A" and "B" referred to above in accordance with the Order of the Court entered on September 28, 1984, a copy of which is marked Exhibit "C", attached hereto and made a part hereof by reference.

The Class 1 claimants shall receive lease payments from Broeg and Associates, Inc., from the rental of property of the estate pursuant to Order of Court entered on September 28, 1984. The Debtor shall execute and deliver on the effective date of the Plan a Quit Claim Deed to the Class 1 claimants conveying the real property described in the Order of Court entered on September 28, 1984.

The Class 1 claimant shall also receive proceeds from the sale of real estate to Stephen E. Wirth, Marty Sweerin, and Donald Gross pursuant to Order of the Court entered on September 28, 1984.

The Class 1 claimants shall retain no liens or encumbrances on property of the Debtor after the effective date of the Plan except as specifically provided for herein.

The unsecured portion of the claim, if any, shall be treated as a Class 9 claim.

4.02 *Class 2.* (Secured claim of Garland Carver, Successor Trustee to Mt. Pleasant Bank & Trust Company for Mt. Pleasant, Iowa Industrial Revenue Bond Issues in the principal

amount of approximately \$888,846.81 (secured and unsecured portions by virtue of claim No. 24) secured by virtue of a lien on the Debtor's equipment and a mortgage on real estate situated in Mt. Pleasant, Iowa). A foreclosure action has been completed in the Iowa District Court for Henry County, and title to the real estate is now vested in the Class 2 claimant. After crediting the proceeds from the foreclosure sale to the claim, a deficiency remains of \$253,244.29. The unsecured portion of the claim shall be treated as a Class 9 claim.

4.03 *Class 3.* (Secured claim of Garland Carver, Successor Trustee to Mt. Pleasant Bank & Trust Company for City of Gilman Industrial Revenue Bond Issues in the principal amount of approximately \$957,474.32 (secured and unsecured portions by virtue of claim No. 23) secured by virtue of a lien on the Debtor's equipment and a mortgage on the Debtor's real property situated in Gilman, Iowa). The secured claim in Class 3 shall be settled and satisfied by payment of \$400,000.00 (less payments received pursuant to Order of Court entered on June 27, 1985, less the \$1,500.00 per month that was paid as "adequate protection" during the course of the Chapter 11 proceeding and funds escrowed at the Hawkeye Bank and Trust Company, Mt. Pleasant, Iowa, in connection with the Industrial Revenue Bond Issues [approximately \$31,546.96]) on the effective date of the Plan or upon the closing of the Iowa Business Growth Financing Agreement, whichever is later. Upon payment of the funds specified above, the claimant in Class 3 shall release any and all liens encumbering the Debtor's assets.

The unsecured portion of the claim (\$557,474.32) shall be treated as a Class 9 claim.

4.04 *Class 4.* (Secured claim of Leilla Kennedy Trust in the principal amount of approximately \$33,300.00 as contract seller of a tract of land located in Henry County, Iowa) The secured claim in Class 4 shall be settled and satisfied by payment to the holder of such claim the annual contract payment of principal

and interest (approximately \$8,250.00) as provided for in the contract between the Debtor and the Class 4 claimant. The secured claimant in Class 4 will retain its lien on the property of the Debtor to a maximum amount equal to the principal amount of the secured claim of the holder thereof as of the date of confirmation of the Plan and as provided by Order of Court entered September 28, 1984.

4.05 *Class 5.* The unsecured claim in Class 5 having priority by reason of the provisions of 11 U.S.C. Section 507(a)(1), which includes expenses of administration as finally allowed by the Court, shall be settled and satisfied by a payment to the holder of 100% of their claims, without interest or charges, upon the effective date of the Plan or as may be agreed upon by the Debtor and any Class 5 claimant.

4.06 *Class 6.* (unsecured claims having priority by reason of the provisions of 11 U.S.C. Section 507 of approximately \$44,984.41 by virtue of Claim Nos. 5, 6, 9, 10, 12, 13, 16, 17, 19 and 21, as finally allowed and determined by the Court other than those in Class 5). The unsecured claims in Class 6 shall be paid in full by payment to the holders thereof equal annual installments of principal and interest over a term of six (6) years or seventy-two (72) months. The first payment shall be made on the effective date of the Plan and on a like date each year during the life of the Plan. Interest shall accrue on the principal balance in accordance with Internal Revue Code Section 6621 (26 U.S.C. section 6621) as of the effective date of the Plan. Each creditor in Class 6 shall receive a pro-rata share of the installment in proportion to its claim.

The Debtor contests Claim Nos. 5, 9, 6, 10, 17, 19 and 21. Payments on these claims shall be deposited in the Contested Claim Fund pending objection by the Debtor and order of Court.

Upon, and to the extent of, the disallowance of the contested claims described above by Final Order of Court or written

agreement of the holder of such contested claim, the funds so deposited shall be revested in the Debtor.

4.07 *Class 7.* (The unsecured claim of Southeastern Foam Products, Inc.). The claim in Class 7 shall be disallowed and shall not receive any payment under the Plan.¹

4.08 *Class 8.* (The unsecured claim of Holland Plastics, Inc. and Scientific Applications, Inc.) The claims in Class 8 shall be disallowed and shall not receive payment under the Plan.

4.09 *Class 9.* (Timely filed unsecured claims with an principal amount of approximately \$1,701,385.14 excluding any deficiency or undersecured claims). The claimants in Class 9 shall be settled and satisfied by payment to the holders of such claims a pro-rata share of \$5,000.00 on the effective date of the Plan. The Class 9 claimants shall also receive a pro-rata share of \$10,000.00 on August 1, 1990.

The Debtor shall file prior to the effective date of the Plan objections to any and all Class 9 claims that are disputed or contested by the Debtor. Payments on these claims shall be deposited in the Contested Claim Fund pending Order of Court in proportion to each disputed claimant's pro rata share of the payments referred to above.

Upon, and to the extent of, the disallowance of the disputed and contested claims described above by Final Order of Court or written agreement of the holder of such a contested claim, the funds so deposited shall be revested in the Debtor.

¹ The Debtor and the Bankruptcy Trustee of Southeastern Foam Products, Inc., have reached a tentative settlement to compromise the various claims by payment to the Debtor the sum and amount of \$61,000.00. The Settlement Agreement has been submitted to the United States Bankruptcy Court for the Southern District of Iowa and the United States Bankruptcy Court for the Northern District of Georgia, Atlantic Division for approval. A copy of the Settlement Agreement and Order is on file with the Clerk of Court, United States Bankruptcy Court for the Southern District of Iowa.

4.10 *Class 10.* (Equity interest holders) The interest holders in Class 10 shall retain their interest in the Debtor corporation.

ARTICLE V

IMPAIRMENT OF CLASSES

5.01 The following classes are impaired under the Plan: 1, 3, 6, 7, 8, and 9.

5.02 The following classes are unimpaired under the Plan: 2, 4, 5, and 10.

ARTICLE VI

EXECUTORY CONTRACTS AND UNEXPIRED LEASES

6.01 Any executory contract or unexpired lease not rejected by the Debtor under the Plan or upon application to the Court by the Debtor prior to the confirmation date shall be deemed to have been assumed by the Debtor upon the confirmation date.

The Debtor does not hereby reject any executory contracts or unexpired leases. The proponent reserves the right to amend the Plan for purpose of listing such executory contracts or unexpired leases as the proponent may seek to reject pursuant to the Plan.

Each person who is a party to any contract or lease rejected pursuant to this Article, and only such person, shall be entitled to file, not later than thirty days after the confirmation date, a Proof of Claim for damages alleged to arise from the rejection of any such contract or lease to which such person is a party.

ARTICLE VII

EVENTS OF DEFAULT

7.01 The occurrence of any one of the following shall constitute an event of default under the Plan:

- A. Failure to pay fully any payment required to be made ~~under the Plan~~ within 60 days after the due date thereof;
- B. Failure of the Debtor to comply with or to perform any material provision of this Plan which failure remains uncured for a period of 60 days after receipt of written notice by the Debtor.

ARTICLE VIII

MISCELLANEOUS PROVISIONS

8.01 Upon confirmation, the Debtor shall be vested with all assets and shall retain all property except as specifically provided in the Plan for the purpose of continuing the business operation, free from any liens not expressly retained herein.

8.02 The Court shall retain jurisdiction of subsequent to confirmation for the following purposes only:

- A. Allowing claims and hearing objections thereto;
- B. Allowing and approving the payment of administrative expenses;
- C. Completing any adversary proceedings pending;
- D. Determining and resolving any defaults under the Plan;
- E. Determination of the propriety of the terms and conditions of the sale of any of the property of the Debtor;
- F. To make such other orders as are necessary or appropriate to carry out the provisions of the Plan;
- G. To modify the Plan pursuant to 1127(b) of the Code;
- H. To correct any defect, cure any omission or reconcile any inconsistency of the Plan or order of confirma-

tion as may be necessary to carry out the purposes and intent of the Plan;

- I. To adjudicate all claims to any lien on any property of the Debtor or any proceeds thereof;
- J. To determine the amount of any secured claim;
- K. To recover all assets and properties of the Debtor, wherever located, to the extent necessary for consummation of this Plan.

8.03 The Debtor reserves the right to begin or to continue any adversary proceedings permitted under Title 11, United States Code.

DATED this 7 day of March, 1986.

WIMER, HUDSON, FLYNN, AND
NEUGENT, P.C.

/s/ Michael P. Mallaney
222 Equitable Building,
Des Moines, Iowa 50309
Phone: 515-244-4201

ATTORNEY FOR DEBTOR

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF IOWA

Case No. 83-336-C

Chapter 11

IN RE:
SAI CORPORATION,
Debtor.

**AMENDMENT TO FIRST AMENDED AND FULLY
SUBSTITUTED PLAN OF REORGANIZATION**

(Filed: April 6, 1986)

COMES NOW, the Debtor, and amends the First Amended And Fully Substituted Plan Of Reorganization filed herein on March 7, 1986, in the following respects:

1. *Article I, Definitions*, Paragraph 1.17 should be amended to read as follows:

“1.17 *Effective Date of the Plan* means the closing of the Iowa Business Growth Financing Agreement.”

2. *Article IV, Provisions For Payment Of Claims*, Paragraph 4.03 should be amended to read as follows:

“4.03 *Class 3*. (Secured claim of Garland Carver, Successor Trustee to Mt. Pleasant Bank & Trust Company for City of Gilman Industrial Revenue Bond Issues in the principal amount of approximately \$957,474.32 (secured and unsecured portions by virtue of claim No. 23) secured by virtue of a lien on the Debtor's equipment and a mortgage on the Debtor's real property situated in Gilman, Iowa). The secured claim in Class 3 shall be settled and satisfied by payment of \$400,000.00 (less payments received pursuant to Order of Court entered June 27, 1985, less the \$1,500.00 per month that was paid as “adequate protection” during the course of the Chapter 11 proceeding and

funds escrowed at the Hawkeye Bank and Trust Company, Mt. Pleasant, Iowa, in connection with the Industrial Revenue Bond Issues [approximately \$31,546.96]) on the effective date of the Plan. Upon payment of the funds specified above, the claimant in Class 3 shall release any and all liens encumbering the Debtor's assets.

The unsecured portion of the claim (\$557,474.32) shall be treated as a Class 9 claim."

In all other respects the First Amended And Fully Substituted Plan Of Reorganization filed March 7, 1986, should remain unchanged.

WIMER, HUDSON, FLYNN, AND
NEUGENT, P.C.

/s/ Michael P. Mallaney
222 Equitable Building,
Des Moines, Iowa 50309
Phone: 515-244-4201

ATTORNEY FOR DEBTOR

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF IOWA

Case No. 83-336-C

Chapter 11

IN RE:
SAI CORPORATION,
Debtor.

**SECOND AMENDMENT TO FIRST AMENDED AND
FULLY SUBSTITUTED PLAN OF REORGANIZATION**

(Filed: July 8, 1986)

COMES NOW, SAI Corporation, Debtor, and amends the First Amended And Fully Substituted Plan Of Reorganization filed herein on March 7, 1986, as amended April 1, 1986, in the following respects:

1. *Article I, Definitions*, Paragraph 1.17 should be amended to read as follows:

“1.17 *Effective Date of the Plan* means the closing of the Iowa Business Growth Financing Agreement or 30 days from the order of confirmation, whichever is sooner.”

2. *Article III, Classification of Claims and Interests*, Paragraph 3.02 should be amended to add the following claim:

“k. *Class 11 Claim* shall consist of the tax claim of the Marshall County Treasurer, Marshall County, Iowa.”

3. *Article IV, Provisions For Payment of Claims*, Paragraph 4.01 should be amended to read as follows:

“4.01 *Class 1 Claim*. (Secured claims of Centerre Bank National Association and Federal Deposit Insurance Corporation with a principal balance of approximately \$867,808.18 (secured and unsecured portions by virtue of claim Nos. 32 and 71 respectfully) secured by virtue of a

lien on the Debtor's equipment, inventory, accounts receivable and real property legally described in Exhibit "A" and "B" which are attached hereto and made a part hereof by reference. The secured claim in Class 1 shall be settled and satisfied by payment to the holders of such claims, their proportionate share of the net proceeds from the sale of personalty (excluding stock) in which the Class 1 claimants have a first lien no later than one year after the effective date of the Plan. The Debtor shall also assign any claim it may have against the Southeastern Foam Products, Inc. to the Class 1 claimants. Proceeds from this claim shall be paid to the Class 1 claimants upon the entry of the Order of confirmation. The Class 1 claimants shall retain their lien on the property of the Debtor legally described in Exhibit "A" and "B" referred to above in accordance with the Order of Court entered on September 28, 1984, a copy of which is marked Exhibit "C", attached hereto and made a part hereof by reference.

The Class 1 claimants shall receive lease payments from Broeg and Associates, Inc., from the rental of property of the estate pursuant to Order of Court entered on September 28, 1984. The Debtor shall execute and deliver on the effective date of the Plan a Quit Claim Deed to the Class 1 claimants conveying the real property described in the Order of Court entered on September 28, 1984.

The Debtor shall also assign on the effective date of the Plan all its right, title and interest in a contract from the sale of real estate to Stephen E. Wirth, Marty Sweerin, and Donald Gross pursuant to Order of Court entered on September 28, 1984.

At the time of the filing of the Petition herein, the Class 1 claimants held a security interest in the Debtor's accounts receivable. Pursuant to order of Court entered on August 1, 1983, the Class 1 claimants retained their lien on accounts receivable. The Class 1 claimants shall retain their

lien on an account receivable from Lomount Materials Corp., and shall, as of the effective date of the Plan, be allowed to collect the same and exercise all legal remedies available under the applicable State law.

The Class 1 claimants shall retain no liens or encumbrances on property of the Debtor after the effective date of the Plan except as specifically provided for herein.”

4. *Article IV, Provisions for Payment of Claims*, should be amended to add the following:

“4.11 *Class 11.* (tax claim of Marshall County Treasurer). The Class 1 claim shall be settled and satisfied as follows:

1. The real property and personal property tax claim of the Marshall County Treasurer for the years 1979, 1980, and 1981 shall be paid in full on the effective date of the Plan.

The remainder of the real and personal property taxes shall be paid in full within two years or twenty-four months from the effective date of the Plan.”

In all other respects, the First Amended And Fully Substituted Plan of Reorganization filed on March 7, 1986, and Amendment filed April 1, 1986, should remain unchanged.

Respectfully submitted,

WIMER, HUDSON, FLYNN, AND
NEUGENT, P.C.

/s/ Michael P. Mallaney
222 Equitable Building
Des Moines, Iowa 50309
Phone: 515-244-4201

ATTORNEY FOR DEBTOR

APPENDIX H

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF IOWA**

CASE NO. 83-336-C

**IN RE:
SAI CORPORATION,
Debtor.**

ORDER CONFIRMING PLAN

(Filed: July 8, 1986)

The First Amended and Fully Substituted Plan of Reorganization under Chapter 11 of the Bankruptcy Code filed by the Debtor on March 7, 1986, Amendment to First Amended and Fully Substituted Plan of Reorganization filed on April 1, 1986, and Second Amendment to First Amended and Fully Substituted Plan of Reorganization filed on July 8, 1986, (the "Plan") having been transmitted to creditors and equity security holders as is appropriate; and

It having been determined after hearing on notice that:

1. The Plan has been accepted by the creditors and equity security holders whose acceptance is required by law;
2. The provisions of Chapter 11 of the Code have been complied with;
3. The Plan has been proposed in good faith and not by any means forbidden by law;
4. Each holder of a claim or interest has accepted the Plan or will receive or retain under the Plan property of a value, as of the effective date of the Plan, that is not less than the amount that such holder would receive or retain if the Debtor were liquidated under Chapter 7 of the Code on such date;

5. All payments made or promised by the Debtor or by a person issuing securities or requiring property under the Plan or by any other person for services or for costs and expenses, in, or in connection with, the Plan and incident to the case shall be fully disclosed to the Court to be fixed after confirmation and will be subject to approval of the Court;

6. The identity, qualifications, and affiliations of the persons who are to be directors or officers of the Debtor after confirmation of the Plan have been fully disclosed; and

7. The identity of any insider that will be employed or retained by the Debtor has been fully disclosed.

IT IS ORDERED:

1. That the First Amended and Fully Substituted Plan of Reorganization filed by the Debtor on March 7, 1986, Amendment to First Amended and Fully Substituted Plan of Reorganization filed April 1, 1986, and Second Amendment to First Amended and Fully Substituted Plan or Reorganization filed on July 8, 1986, (the "Plan") is confirmed.

/s/ Richard Stagamen,
U.S. Bankruptcy Judge

Dated: 7-8-86